United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

772

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,883

BREWERY AND BEVERAGE DRIVERS AND WORKERS LOCAL UNION No. 67, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

Petition for Review to Set Aside in Part an Order of the National Labor Relations Board

United States Court of Appeals
For the
District of Columbia Circuit

FILED OCT 14 1957

Joseph W. Stewart
CLERK

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NATIONAL LABOR RELATIONS BOARD, *Respondent*

Petition for Review to Set Aside in Part an Order of the National Labor Relations Board

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JOINT APPENDIX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 5-CA-688

WASHINGTON COCA-COLA BOTTLING WORKS, INC.

and

BREWERY AND BEVERAGE DRIVERS AND WORKERS, LOCAL No. 67, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO[1]

Decision and Order

On September 27, 1955, Trial Examiner A. Bruce Hunt issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter the Respondent filed exceptions to the Intermediate Report and a supporting brief; the General Counsel filed a memorandum in support of the Intermediate Report.[2]

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, brief, and memorandum, and the entire record in the case, and hereby adopts the findings, conclusions and recommendations of the Trial Examiner only to the extent that they are consistent herewith:

1. We agree with the Trial Examiner that the Respond-

[1] The name of the charging party is amended to show the new parent organization.

[2] The Respondent also requested oral argument. The record, the exceptions, brief, and memorandum fully present the issues and the positions of the parties. The request is denied.

ent has violated Section 8 (a) (1) of the Act, and that its conduct demonstrates a clear pattern of interference, restraint and coercion of its employees in their efforts to exercise the rights guaranteed them in Section 7 of the Act.

2. We do not, however, agree with the Trial Ex-
8936 aminer's conclusion that the Respondent violated Section 8 (a) (5) of the Act.

The record shows, as found by the Trial Examiner, that on January 15 and again on January 19, the Union made certain requests for bargaining which on their face did not clearly delineate the unit, and on each occasion the Respondent refused recognition, insisting upon a Board election. Thereafter, on January 26, 1953, union representative Caton requested the Respondent's plant manager Fiske to sign a statement recognizing the Union as sole bargaining representative of the Respondent's "drivers and driver-salesmen." As Fiske again rejected the Union's bargaining request, Caton prepared a letter which was delivered to the Respondent that same day, asserting that the Union represented 39 of 46 "drivers and driver-salesmen" and that because of the Respondent's failure to bargain the Union would strike the next day and file charges against the Respondent. We find, in agreement with the Trial Examiner, that through its letter of January 26 the Union made clear beyond doubt the unit that it sought, which was the same as that in which two prior consent elections had been held, and consisted solely of the driver-salesmen at the Respondent's Washington, D. C., plant, of whom there were then 44 employed by the Respondent.

In its charge the Union likewise alleged the unit in which it asserted the Respondent had refused to bargain as consisting of the "drivers and driver-salesmen," and the complaint issued thereon by the General Counsel similarly described the unit. At the hearing upon the complaint, however, the General Counsel provided a written response to the Respondent's request for a bill of particulars, in which he stated that the unit appropriate for purposes of

the complaint proceeding included the Respondent's driver-salesmen, full service drivers, cup route drivers, and salesmen-trainees at the Washington plant, and litigation of the issues raised by the complaint thereafter proceeded upon the basis of this latter unit description. The unit thus described included approximately 58 employees, and differs substantially from the units in which the prior consent elections had been held by the addition of the aforementioned classification of full service drivers, cup route drivers, and salesmen trainees.

8937 The Trial Examiner found that the Respondent violated Section 8 (a) (5) by refusing to bargain with the Union for the employees in the unit described by the General Counsel at the hearing. Although he recognized that the unit in which the Union had requested bargaining was not the same as that which the General Counsel had thus alleged to be appropriate, and that in fact the Union had not even requested the Respondent to bargain in the unit described in the General Counsel's bill of particulars, he nonetheless held that this did not constitute a fatal defect in the General Counsel's proof. The Trial Examiner found that any variance between the unit in which the request for bargaining was made and the one found by him to be appropriate was not substantial enough to preclude the Board from finding that a proper bargaining demand had been made. In doing so, the Trial Examiner relied upon the *Barlow-Maney case.*[2] We do not agree.

In *Barlow-Maney,* the Board dismissed the complaint's allegation of an unlawful refusal to bargain on two specific grounds: (1) that the charging union had not possessed a majority in either of the units for which it had requested recognition—an issue not involved in the instant case; and (2) that the Trial Examiner revised the unit by excluding therefrom certain working foremen and plant clericals whom the union had in fact sought to represent. In so doing the Board noted that the Union had made no request for

[2] *Barlow-Maney Laboratories,* 65 NLRB 928.

recognition in the unit found by the Trial Examiner to be appropriate, and expressed its opinion in the following language (65 NLRB at 943):

> Assuming that the unit as defined *ex post facto* in the Trial Examiner's findings could be deemed an appropriate one, and further assuming that the majority of the employees included therein had given authorization cards to the Union, the record fails to show that the Union ever requested the employer to recognize it as the bargaining representative of *such* a group. Because a prior appropriate request for bargaining is a condition precedent to any finding of a refusal to bargain, we think the Trial Examiner erred in finding a violation of Section 8 (5) in this case.

8938 The Board continued by pointing out that "By this, we do not mean that this Board, in reviewing the record in a complaint case, may not sustain an allegation based on Section 8 (a) (5) and yet make minor variations in the unit originally proposed by the charging labor organization."[3]

Moreover, as the Supreme Court pointed out in the *Columbian Enameling* case,[4] an employer cannot be found to have refused to bargain collectively with the represenative of an appropriate unit until the representative has first sought or indicated a desire to bargain for that unit. From all this it is evident that a substantial variance from the requested unit will preclude a finding that a proper bargaining demand has been made. In the present case it is clear that the Union requested recognition in a unit substantially different from the unit alleged at the hearing, and found by the Trial Examiner, to be appropriate. Accordingly, upon the entire record and consistent with the foregoing cases, we find that the Union did not make a

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[3] It is upon this language in *Barlow-Maney* that the Trial Examiner specifically relies.

[4] *N. L. R. B.* v. *Columbian Enameling & Stamping Co. Inc.*, 306 U.S. 292, 300, cited by the Board in *Barlow-Maney, supra.*

proper bargaining demand, and, therefore, the Respondent's refusal to bargain did not violate Section 8 (a) (5) of the Act.[5]

We do not intend, of course, hereby to require that a labor organization shall always precisely define the unit it seeks to represent. Our holding does not, in our opinion, place an undue or improper burden upon the Union, for when in an instance where it has not secured the benefit of the Board's determination of its representative status, it seeks to enforce its demand for bargaining through the Board's unfair labor practice procedure, it must of necessity be prepared to meet the requirements of proof of all the elements essential to a finding that an unfair labor practice has been committed, including not only its majority status, but also the fact of a proper demand for bargaining and its refusal. If the parties are in dispute, or if any doubt exists, as to the appropriate composition of the unit, the law has provided a ready recourse in the Board's representation procedures.[6] Here, although the Respondent had insisted upon a Board election, the Union did not avail itself of this method, but chose to demand recognition in a specific unit and thereafter to engage in a recognition strike, following which we are now

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[5] In agreeing with the result reached by the majority, Member Bean is of the opinion that it is sufficient for the purposes of deciding this case, to hold, on the basis of the *Columbian Enameling* case, *supra*, and the second ground of the Board's decision in *Barlow-Maney, supra*, that the Respondent's refusal to bargain with the Union as the asserted representative of a unit different from that for which bargaining was requested, is not violative of Section 8 (a) (5) of the Act.

[6] Contrary to our dissenting colleague, the instant case does not overrule the *Sunset Lumber* case. The degree of variance was clearly more marked here than there. In the cited case the only change by the Trial Examiner in the unit consisted of the addition of certain employees in the categories requested. Here, however, the changes consisted of the addition of three categories of employees to the requested unit.

We also find it unnecessary to comment on the quoted language from the *Aiello* decision relied upon by our dissenting colleague. The issue here, unlike there, relates to whether a proper bargaining demand was made. Our dissenting colleague will doubtless agree that absent a proper bargaining demand there is lacking an essential precondition to testing the 8 (a) (5) allegations of any complaint. Needless to remark, we are not, as our dissenting colleague claims, dismissing the 8 (a) (5) charge herein because the Union "did not avail itself" of a Board election but simply because it did not make a proper bargaining demand.

called upon to find that a refusal to bargain occurred in a substantially different unit. Not only do we believe that the requirements for establishing the commission of an unfair labor practice have not been met in this case, but we are of the further opinion that it would not promote or encourage the processes of peaceful collective bargaining to require the Respondent to recognize and bargain with the Union for a unit proposed for the first time in this unfair labor practice proceeding and substantially different from the Union's original request.

The Remedy

The Trial Examiner found that the strike was an unfair labor practice strike because it was caused and prolonged by the Respondent's unfair labor practices. As we have found above that there was no unlawful refusal to bargain with the Union, and as we are not satisfied that the strike was caused or prolonged by any other unfair labor practices, it follows that the strike was not an unfair labor practice strike, but rather an economic strike. In view of this finding, we shall not, as recommended by the Trial Examiner, require that the Respondent upon ap-
8940 plication reinstate the strikers, dismissing replacements hired on or after January 27, 1953, if necessary, to provide such reinstatement.

Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Washington Coca-Cola Bottling Works, Inc., Washington, D. C., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating and threatening its employees concerning union affiliation and activities in a manner con-

stituting interference, restraint, or coercion in violation of Section 8 (a) (1) of the Act;

(b) Changing its practices concerning working conditions for the purpose of undermining the employees' union activities;

(c) Soliciting employees to discontinue protected concerted activities;

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Brewery and Beverage Drivers and Workers Local No. 67, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post at its plant in Washington, D. C. copies of the notice attached hereto and marked Appendix.[7] Copies of said notice, to be furnished by the Regional Director
8941 for the Fifth Region shall, after being duly signed by an authorized representative of the Respondent, be posted by the Respondent immediately upon receipt thereof and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent

[7] If this Order is enforced by a United States Court of Appeals, the notice shall be amended by substituting for the words "A DECISION AND ORDER" the words, "A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

to insure that said notices are not altered, defaced, or covered by any other material;

(b) Notify the Regional Director for the Fifth Region, in writing, within ten (10) days from the date of this Order, of the steps it has taken to comply herewith.

AND IT IS FURTHER ORDERED that except as found herein, the complaint in this case be, and it hereby is, dismissed.

Dated, Washington, D. C.

BOYD LEEDOM, *Chairman*
PHILIP RAY RODGERS, *Member*
STEPHEN S. BEAN, *Member*
NATIONAL LABOR RELATIONS BOARD

(SEAL)

8942 ABE MURDOCK, MEMBER, *dissenting in part:*

The primary issue in this case is the allegation in the complaint that the Respondent refused to bargain in good faith with the Union, in violation of Section 8 (a) (5) of the Act. While accepting the Trial Examiner's finding that the Respondent's conduct before, on, and after its refusal to bargain "demonstrates a clear pattern of interference, restraint and coercion of its employees in their efforts to exercise the rights guaranteed them in Section 7 of the Act," the majority insists that there was no violation of Section 8 (a) (5) by the Respondent in this case, on the sole ground that the Union "requested recognition in a unit substantially different from the unit alleged at the hearing, and found by the Trial Examiner, to be appropriate." [8]

The majority asserts that their action here is consistent with the *Barlow-Maney* case,[9] upon which the Trial Ex-

[8] As I read Member Bean's concurrence at footnote 5 of the majority opinion, he is suggesting that *any* variance between unit sought and alleged is fatal to an 8 (a) (5) allegation. This position, which I consider entirely erroneous and impractical, is in fact rebutted in the majority opinion itself.

[9] 65 NLRB 928.

aminer relied, in which the Board held that it might find a violation of Section 8 (a) (5) even though it made "minor variations in the unit originally proposed by the charging labor organization," and that they do not intend to require that a union "precisely define" the unit it seeks to represent. I agree with the majority in accepting this principle.

I am equally persuaded, however, that the majority is wrong in characterizing the difference between the unit sought by the Union initially and that found appropriate by the Trial Examiner as a "substantial variance." The record shows that the Union had a clear majority *either* in a unit of drivers and driver-salesmen or in a unit of such employees with the addition of certain employees performing related driving duties, and trainees—the unit ultimately found appropriate by the Trial Examiner. The effect of the majority's opinion is to hold that the mere addition of the latter type of employees to an appropriate unit in some way changes the *essential character* of the unit re-
8943 quested so as to defeat the right of these employees, guaranteed in Section 8 (a) (5) of the Act, to be represented by a union of their choice. I do not believe that either authority or logic supports such a result. It is important to note that the Respondent refused to bargain for *any* unit, never challenged the unit requested by the Union, but instead proceeded immediately to commit serious unfair labor practices in an effort to destroy the Union's majority and unlawfully intimidate its employees.

In these circumstances, to predicate a finding of no violation upon an alleged "substantial variance" in the unit is, I believe, an unsound approach. Certainly, if a union requested bargaining for a unit of journeymen and carpenters, the Board could scarcely find a "substantial variance" between that unit and the same unit expanded by the Board to include carpenter apprentices. The additions to the unit requested in the instant case are not essentially different. And the result of the Board's action here will be that in an area where the Board's expertise is involved, the

charging party must anticipate, with a precision the statute does not require, the Board's ultimate unit determination. For a unit determination by the Board of doubtful inclusions or exclusions of fringe categories can hardly be foretold with certainty by a union seeking bargaining from an unlawfully motivated employer. I do not believe that this is a correct application of *Barlow-Maney* and succeeding cases that have guided the Board in this important area for the past eleven years. Indeed, the majority's decision in this case implicitly overrules the Board's decision in *Sunset Lumber & Trim Corporation,* 115 NLRB 866 and is contrary to the most recent decision of the Court of Appeals for the Second Circuit affirming that decision in *N.L.R.B.* v. *Sunset Lumber & Trim Corp.*, 39 LRRM 2441. In that case the Union requested bargaining for six truck drivers and yardmen and the complaint alleged this to be the appropriate unit. In his Intermediate Report the Trial Examiner there rejected the contention that the appropriate unit consisted only of these six employees and added three employees whose duties involved truck driving or yardwork, exactly the situation in the instant case. The Board adopted the Trial Examiner's findings and
8944 recommendations. The court affirmed the Board, recognizing "the discretion that must be accorded to the Board in determining the appropriateness of a collective bargaining unit," even though the employees involved may have performed "overlapping functions" within the Respondent's mill. Moreover, the court pointed out that the employer's refusal to bargain "was unquestionably attributable to his anti-union sentiments, rather than to his doubts about the majority status of Local 282." The majority, however, distinguishes the above case from the instant case on the ground that here the unit found appropriate by the Trial Examiner included three additional "categories" not requested by the Union. I am loathe to engage in a semantic argument over the meaning of the term "category." If by that term the majority means that

the Trial Examiner added employees to the unit requested by the Union who were not engaged in driving trucks and dispensing coca cola, the record adequately refutes such a notion. The Union originally requested bargaining in a unit of driver-salesmen. The complaint alleged that a unit of drivers and driver-salesmen was appropriate, defining this unit more particularly as driver-salesmen, full service drivers, cup route drivers, and sales trainees. *All of these employees* are engaged in driving trucks, dispensing coca cola in one form or another, promoting the sale of and collecting the purchase price for this product. The difference in their duties is that some deliver coca cola to grocery stores, service stations, clubs and similar establishments; others service machines dispensing coca cola in bottles; while others service machines dispensing coca cola in paper cups. If by the use of the term "category" the majority means that such differences are sufficient to warrant the conclusion that the latter employees cannot properly be classified under the general heading of driver-salesmen then, it seems to me, that argument answers itself.

The majority's opinion that its holding in this case does not "place an undue or improper burden upon the
8945 Union" seems to me especially ironic in the circumstances of this case. For that opinion is based upon the majority's further premise that if doubt exists "as to the appropriate composition of the unit, the law has provided a ready recourse in the Board's representation procedures." Apart from the fact that the Board in this case is faced with the most flagrant and deliberate refusal by this employer to bargain for *any* unit in violation of the statute, the Board itself has made it clear in the most categorical terms that when a Union becomes aware of unfair labor practices before an election *it has the choice either of pursuing the representation proceeding or filing charges alleging an unlawful refusal to bargain.* In *Aiello Dairy Farms,* 110 NLRB 1365 at pages 1367-8, the Board

majority had this to say in dismissing an alleged violation of Section 8 (a) (5):

> It is likewise apparent that when the Union became aware, after the Respondent's refusal to recognize and bargain with it, that the Respondent was engaging in a course of unlawful conduct, it then had two courses of action open to it, either of which it might pursue to establish officially its status as the bargaining agent. It could then have filed charges against the Respondent alleging an unlawful refusal to bargain, or it could pursue the representation proceeding. It chose the latter course, and followed it unwaveringly through to an election. Thereafter, having lost the election, it filed the charges in this proceeding.
>
> Had the Union earlier filed its charge of refusal to bargain, the Board under its long standing practice would not have conducted the representation election until the charges were disposed of. Nor would the Board have accepted a waiver of such a charge as sufficient reason for permitting the election to proceed. [footnote omitted] A reason for this is that although either a representation proceeding or an unfair labor practice proceeding alone might be, in the light of the particular circumstances, the procedure appropriate for establishment of the Union's status, both cannot at once be appropriate because they are based upon fundamentally different premises . . .
>
> Apart from the divergent nature of these processes, sound administrative practice also requires that the Board refuse to proceed with a representation election when charges of refusal to bargain have been filed. [footnote omitted] For the Board, as custodian of a public statute, should not be compelled to diffuse its energy and expend time and public funds in useless and repetitive proceedings. The Union in this case by delaying the filing of its 8 (a) (5) charge circumvented the Board's sound practice of not conducting a representation elec-

tion when an 8 (a) (5) charge is pending and caused the Board to conduct a futile election . . ."

In the face of this decision of the Board, holding, in effect, that Unions aware of unfair labor practices
8946 *must* file charges with the Board rather than proceed to a futile election, the majority now says that this Respondent, which had insisted upon such an election while making a fair election impossible by its own unfair labor practices, may violate Section 8 (a) (5) of the Act with impunity because the Union "did not avail itself" of a Board election and because the Board has found that a unit somewhat enlarged, but not essentially different from that requested by the Union, is the most appropriate unit. The majority's rationale in this case, in my opinion, ignores the Board's considered policy as stated above in the *Aiello* case.

I think that the union here, in its bargaining request, met the standard imposed by *Barlow-Maney*. The unit it sought—a unit of drivers—was appropriate.[10] And the record clearly shows that the Respondent was not at all concerned about what unit the Union sought. In these circumstances to dispose of this case on so technical a ground seems to me unjustifiable. Our findings of various acts of coercion engaged in by the Respondent in violation of Section 8 (a) (1) establish clearly that no matter what unit the Union had asked for, the result would have been the same—a refusal to bargain and a campaign to destroy the union's majority.

Barlow-Maney properly states that a variance is permissible if not too great. What is required is that the union's request be essentially appropriate. That was the case here. And, as my colleagues concede, there is no problem of majority status; whichever unit we consider, the union's majority status is unimpaired. In agreement with the Trial Examiner I would hold that the addition of other types of

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[10] Cf. *Smith Transfer Company, Inc.*, 100 NLRB 834.

drivers and trainees numbering 14 employees, to a basic unit of 44 employees, and clearly ancillary to those sought by the Union, does not change the essential nature of that unit. Therefore, I would, as did the Trial Examiner, reject the variance argument. I would reach the merits of the case, and would find, as did the Trial Examiner, and for the reasons he stated, that the Respondent refused to bargain in good faith.

Dated, Washington, D. C.

ABE MURDOCK, *Member*
NATIONAL LABOR RELATIONS BOARD

8947 APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT interrogate or threaten our employees concerning union affiliation or activities in a manner constituting interference restraint, or coercion in violation of the National Labor Relations Act.

WE WILL not change our practices concerning working conditions for the purpose of undermining our employees' union activities.

WE WILL NOT solicit our employees to discontinue protected concerted activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist BREWERY AND BEVERAGE DRIVERS AND WORKERS, LOCAL NO. 67, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a con-

dition of employment, as authorized in Section 8 (a) (3) of the National Labor Relations Act.

WASHINGTON COCA-COLA BOTTLING WORKS, INC.
(Employer)

Dated..... By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

* * * * * * * * * *

Washington, D. C.

8853 UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case No. 5-CA-688

WASHINGTON COCA-COLA BOTTLING WORKS, INC.

and

BREWERY AND BEVERAGE DRIVERS AND WORKERS, LOCAL NO. 67, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL

John J. A. Reynolds, Jr., Esq., William C. Humphrey, Esq., and *David C. Sachs, Esq.,* of Baltimore, Md., for the General Counsel.

Earle K. Shawe, Esq. and *William J. Rosenthal, Esq.,* of Baltimore, Md., and *John T. Grigsby, Esq.,* and *Robert R. Merhige, Esq.,* of Richmond, Va., for the Respondent.

Martin F. O'Donoghue, Esq., and *William J. Walsh, Esq.,* of Washington, D. C., for the Union.

Trial Examiner: *A. Bruce Hunt.*

Intermediate Report and Recommended Order

STATEMENT OF THE CASE

A charge having been duly filed, a complaint and notice of hearing thereon having been issued and served by the General Counsel, and an answer having been filed by the above-named corporation, a hearing involving allegations of unfair labor practices in violation of the National Labor Relations Act, 61 Stat. 136, herein called the Act, by said corporation, herein called the Respondent, was opened upon due notice in Washington, D. C., on June 24, 1953, before Trial Examiner Albert P. Wheatley. The hearing adjourned without the taking of testimony, and was resumed

on July 13, 1953, before the undersigned Trial Examiner. It continued upon various dates through March 1, 1954. The complaint alleges in substance that (a) on January 15, 1953, and thereafter, the Respondent refused to bargain collectively with the above-named labor organization, herein called the Union, as the exclusive representative of its employees in an appropriate unit, although a majority of said employees had designated the Union as their representative for such purposes, in violation of Section 8 (a) (5) and (1) of the Act; (b) the Respondent *inter alia* threatened to terminate its operations in order to discourage its employees from becoming or remaining members of the Union, interrogated employees concerning their union membership and activities, and threatened and warned the employees to refrain from such activities, in violation of Section 8 (a) (1) of the Act; and (c) on January 27, 1953, certain employees of the Respondent went on strike, which strike was caused and prolonged by the alleged unfair labor practices. All parties were represented by counsel, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file briefs and proposed findings and conclusions. The parties
8854 agreed among themselves, however, with concurrence of the undersigned, not to file briefs and proposed findings and conclusions, but to argue extensively upon the record after a recess in which to prepare therefor. Near the close of the hearing, the Respondent made various motions to dismiss, which are disposed of in accordance with the determination below.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. The business of the Respondent

The Respondent, a Virginia corporation, is engaged in the bottling, sale and distribution of coca-cola. It operates a

plant in Washington, D. C., with which we are here concerned, and other plants in Silver Spring and La Plata, Maryland, and Alexandria and Culpeper, Virginia. During the year 1952, the Washington plant utilized about 500,000 gallons of coca-cola syrup, costing approximately $687,500, which were shipped to that plant from Baltimore, Maryland. During the same year, the Washington plant bottled, sold, and distributed locally in excess of 2,000,000 cases of coca-cola at a figure exceeding $1,600,000. Upon these facts, and upon the Board's plenary jurisdiction over enterprises within the District of Columbia, I find that the Respondent is engaged in commerce within the meaning of the Act.

II. The labor organization involved

Brewery and Beverage Drivers and Workers, Local No. 67, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, is a labor organization admitting to membership employees of the Respondent.

III. The unfair labor practices

A. Preliminary statement

Our principal issue is whether the Respondent unlawfully refused to bargain collectively with the Union during 1953. Prefatory to discussing the events in that year, it is necessary to consider certain preliminary matters, namely, the operations of the Respondent's Washington plant, the question whether employees classified as sales supervisors are supervisors within the meaning of the Act, and the representation elections at that plant in 1944 and 1948.

B. The operations of the Washington plant

At times material, there were approximately 175 employees, including representatives of management, at the Washington plant who were engaged in one aspect or another of the bottling, sale, and distribution of coca-cola. The plant's operations are highly specialized and come within four departments: production, advertising, service,

and sales. Each department is headed by a manager who is responsible to the plant manager and assistant plant manager, Charles Fiske and George Lang, respectively. Further reference will be made to these departments in the discussion of the appropriate unit, and at this time it suffices to say that the General Counsel contends that the unit should be composed of certain employees in the sales department, while the Respondent asserts that employees in other departments should be included. It is necessary at this point, however, to discuss the work of employees in the sales department in order to decide the question whether the sales supervisors are supervisors within the meaning of the Act.

C. The question whether sales supervisors are
8855 *supervisors within the meaning of the Act*

The manager of the sales department is Wilbert Sales. The assistant manager is Vincent Riviello. There is no dispute that these men are supervisors within the meaning of the Act. Other personnel within the sales department are the sales supervisors, the driver-salesmen, the full service drivers, the cup route drivers, and the sales trainees. The driver-salesmen, who number about forty-four and who are sometimes called conventional salesmen and route salesmen, sell and deliver bottled coca-cola to retail outlets, each driver-salesman having a fixed route over which he travels by means of one of the Respondent's trucks. They also perform certain allied functions which will be discussed in connection with the appropriate unit below. The full service drivers, who number about eight, deliver bottled coca-cola to dispensing machines which the Respondent owns and which are located at various types of establishments throughout the city. They fill the machines, make sure that same are in sanitary and working order, and collect the empty bottles and the money in the machines' cash boxes. The cup route drivers, numbering about three, have duties similar to those of the full service drivers,

since each delivers coca-cola to a dispening machine. The cup route drivers, however, do not deliver bottled coca-cola They deliver the syrup and other essentials to machines which dispense the drink in paper cups. The work of both the full service and cup route drivers is a part of their training to become driver-salesmen. The sales trainees, who number about three, are persons in training to become full service or cup route drivers as a preliminary step to becoming driver-salesmen.

The Respondent has 12 sales supervisors. The routes of the driver-salesmen are divided into 8 divisions, sometimes called conventional route divisions, each of which has a supervisor. There is also 1 supervisor in the cup machine division and 2 in the full service division. The twelfth sales supervisor is Marcel Everhart, who has had varied duties as discussed in footnote 2 below.

The General Counsel asserts that the sales supervisors are supervisors within the meaning of the Act; the Respondent asserts the contrary. According to the Respondent, the sales supervisors are supervisors of sales, not of men. Plant Manager Fiske testified that a sales supervisor "supervises sales, and not men," and that they assist the men in their divisions in promoting sales. Everhart, a sales supervisor who has the title of Home Market Salesman, testified that when he had been a sales supervisor in the full service division he had supervised sales and had not supervised the full service drivers. The testimony of Fiske and Everhart is self-contradictory, however. It is also disputed by the testimony of certain other witnesses for the Respondent. For instance, Fiske testified that the sales supervisors engaged in "supervision over them [driver-salesmen] to see if they were performing their duties . . ." and that Joe Baum, a sales supervisor, "has supervision" over the men in his division. Fiske also used the term "his supervisor" as meaning a driver-salesman's supervisor. Everhart, in his testimony, spoke of "My men," of the sales supervisors and "their men," and of a sales

supervisor and "his salesmen." In addition to these indications that Everhart regarded himself and other sales supervisors as supervisors of men, Everhart testified that as Home Market Salesman he did not have a division of routes. In connection with his work in that capacity, he unguardedly spoke of "not having any salesmen under me," but corrected himself to say that he meant that he had not had a division of routes. Florian Witczak, a sales supervisor who testified that his duties were to promote sales of coca-cola and that he had no supervisory authority, testified also concerning "my men" and men "under my supervision." Robert Bland, another sales supervisor, testified that before working in that capacity he had "worked under two [sales] supervisors." Riviello, assistant sales manager and an admited supervisor, testified that a sales supervisor "works with these men that he supervises." Thus, it is apparent from the Respondent's own testimony, without reference to that offered by the General Counsel, that the sales supervisors are not mere supervisors of sales, but that they supervise the men in their divisions. The question remains whether their supervisory functions are such as to make them supervisors within the meaning of the Act.

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The sales supervisors, all of whom were driver-salesmen at one time or another, spend a substantial portion of their working hours on the routes of men in their divisions, either in company with one of the men or working a route alone because the route man is on vacation or absent for another reason.[1] When accompanying an employee, the sales supervisor assists him in performing the work, observes whether he has been performing his duties properly, and confers with the customers. Attention is given to such matters as the use and the location of advertising, the display of bottled coca-cola, and the cleanliness of machines. Kenneth Keeler, a sales supervisor who was a witness for

[1] When working the route alone, a sales supervisor is usually accompanied by a helper. The driver-salesman receives the commission from the route less the wages of the helper. The sales supervisor is paid a salary.

the Respondent, testified that the only "way to see that he [a driver-salesman] carries out the policies of the company" is to work with him on the route, and that there is no difference between carrying out the Respondent's policies and "performing the duties [of a driver-salesman] in a satisfactory manner." Plant Manager Fiske testified that the sales supervisors are held responsible for the success of the "sales operation" of the men in their respective divisions. In this connection, the Respondent holds periodic general sales meetings which are attended by the sales personnel and at times by other employees. Prior to a general sales meeting, the Respondent holds a meeting of the sales supervisors at which there is a preview of the program for the next general sales meeting, which may involve new sales promotion plans. The sales supervisors are thereby made acquainted with the program and, following the general sales meeting at which it is explained to the men in their division, the sales supervisors are required to see that the men carry out the new program.

From time to time the sales supervisors make reports to their superiors concerning the work performance of men in their divisions. According to Fiske, such reports are not made "very often" at the meetings of sales supervisors, but are the subjects of private discussions in which inquiry is made of a sales supervisor or in which a sales supervisor volunteers a favorable or adverse report on a man in his division.

The record contains much testimony concerning the supervisory authority which the position of sales supervisor involves. A number of sales supervisors who were witnesses for the Respondent testified that they had not been told that they possessed, or that they did not possess, any supervisory authority. The record is clear that they do not possess authority to hire, to discharge, to suspend, to lay off, or to transfer an employee from one route to another. The question remains, however, whether they make effective recommendations on any such matter.

Everett W. Thompson, a witness for the General Counsel, was a sales supervisor for a period in 1948 and 1949. He testified credibly, and I find, that he possessed authority to recommend that driver-salesmen in his division be transferred from one route to another. Since the driver-salesmen work on a commission basis, and since some routes are more profitable than others, the transfer of a driver-salesman can affect his income. In addition to Thompson's testimony, there is the testimony of several driver-salesmen that certain sales supervisors represented themselves as possessing authority to recommend transfers. Thus, Edward M. Strandberg, a driver-salesman, testified for the General Counsel, and I find, that prior to his transfer from the job of cup route driver to that of driver-
8857 salesman in 1949 or 1950, the supervisor of the cup machine division, Everhart,[2] told him that he "was doing a good job" and that Everhart would recommend the transfer.[3] Strandberg also testified, and I find, that later he was transferred to a different route, following the recommendation of Bill McDaniels, a sales supervisor.[4]

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[2] At the time of the hearing and for some time earlier, Everhart had the title of Home Market Salesman in which work he promoted the sale of coca-cola in cartons for consumption in homes. He had been a sales supervisor before, however, and after becoming Home Market Salesman he continued to attend meetings of sales supervisors and frequently worked as a sales supervisor. According to Fiske, Everhart "is a supervisor with duties of home [market] salesman." Moreover, it is apparent that Everhart continues to regard himself as a sales supervisor, as, for instance, in his testimony that his annual bonus is the "Same as the other supervisors" receive.

[3] Everhart testified that when he was the cup route supervisor and Wilbert Sales, the sales manager, was confronted with the question of selecting someone to fill a vacancy as a driver-salesman, Sales asked him about the work performance of the cup route drivers, that he answered with respect to each man, and that Sales made "his own choice" without asking for Everhart's selection. Everhart testified further that he did not recommend that Strandberg be transferred to a conventional route and that he did not tell Strandberg that he would recommend such transfer. Sales testified that no one recommended the transfer of Strandberg. I cannot credit the testimony of Everhart and Sales. As recited above, Everhart's testimony that sales supervisors do not supervise men, but only sales, was both unconvincing and contradicted by the testimony of himself and other witnesses for the Respondent. Moreover, as will appear, the testimony of Everhart and Sales must be discredited in other instances.

[4] At the time of the hearing, McDaniels was in the United States Navy. He was not a witness. Wilbert Sales testified, however, that McDaniels did not recommend the transfer.

Another driver-salesman, Thomas Driver, testified, and I find, that in 1949, shortly before he was transferred from a cup route to a conventional route, he was told by Everhart that Everhart had "finally got . . . [him a conventional] route."[5] James Hensley, a driver-salesman, testified, and I find, that he had heard Sales Supervisor Witczak say that Witczak would recomend for advancement or another route a driver-salesman who was "doing a good job."[6]

The full service drivers, who deliver bottled coca-cola to the Respondent's dispensing machines at various points in the city, may work on weekends in addition to their regular hours of work. A schedule for weekend work, which contained the names of some, but not all, of the full service drivers was prepared by the sales manager, Wilbert Sales, and posted on a bulletin board for the attention of the affected men. In preparing the schedule, Sales first asked William Miron, a full service sales supervisor, which of the full service drivers were capable of performing the weekend work.

The Respondent's business is heaviest during the
8858 summer months, and in preparation for the increased business a major revision of routes takes place each spring. This revision involves the establishment of new routes and the shortening of winter routes. The sales supervisors participate in such revision, working in cooperation with Wilbert Sales, who gives them instructions and who approves the final arrangement. But the extent of such participation by the sales supervisors, as well as their later adjustment of individual routes by the addition or substraction of customers, is at issue. Witnesses for the Respondent, including several sales

[5] Everhart contradicted Thomas Driver's testimony. He also denied having recommended the transfer or having discussed it with Driver. He testified that when a salesman was transferred from one route to another it was customary for a sales supervisor, upon the instruction of the sales manager, to tell the salesman of the transfer and that he "could have told Tommy Driver that he [Driver] would be changing routes . . ."

[6] Witczak contradicted Hensley's testimony in certain respects, but he did not deny having made this remark which Hensley attributed to him.

supervisors, testified that their participation was minute and that all decisions of consequence were made by Sales.[7] On the other hand, Thompson, the ex-sales supervisor who was a witness for the General Counsel as recited above,[8] testified to the contrary. Thompson also testified, and I find, that he and other sales supervisors were empowered to adjust the routes of men in their divisions in order to equalize the routes, to give better service to customers, and to avoid a long trip by one of the Respondent's trucks when another driver-salesman could service the customer by a short trip.[9] In addition, Thomas Driver testified, and I find, that he worked in the division of which Johnnie N. Harwell was the sales supervisor, that in the latter part of 1952 a driver-salesman in that division left the Respondent's employ, that Driver asked Harwell if he could be transferred to the vacant route, and that Harwell said that he, Harwell, would try to effect the transfer. Driver testified further, and I find, that subsequently Harwell told him that the transfer could not be made, but that Harwell would give to Driver the best customers on the vacant route, and that together they "went through" the

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[7] Although sales supervisors testified that they were careful to point out to driver-salesmen that adjustments had been made by Sales, a number of driver-salesmen denied that the sales supervisors had done so. As appears below, I find it necessary to frequently discredit the testimony of some sales supervisors in other instances, and I do not believe that they made it a practice to inform driver-salesmen that the sales manager, not they, was responsible for adjustments in routes.

[8] Thompson testified that he had been a sales supervisor during a portion of 1948 and 1949, that he could not recall the exact dates, and that he believed the period was from the spring of 1948 to the spring of 1949. He testified further that the sales manager at that time was the current sales manager, Sales, and not an earlier sales manager, Russell L. Hall. The Respondent sought to discredit Thompson's testimony by establishing, in part, that in this respect Thompson was in error. Thus, Hall, now the plant's advertising manager, testified that he had been sales manager when Thompson had been a sales supervisor, and Wilbert Sales testified that "in the forepart of his [Thompson's] term as supervisor, sales supervisor, Mr. Hall was sales manager. In the latter part, I was." This conflict is heightened by a conflict in the testimony of Sales and Hall. Thus, Sales testified that he, Sales, has been sales manager since July 1949, but Hall testified that he, Hall, was sales manager from an undisclosed time in 1948 or earlier to "Approximately" January 1951. I do not believe it necessary to resolve these conflicts.

[9] Wilbert Sales testified that Thompson did not have authority to adjust routes in such manner. For reasons which will appear, I cannot credit Sales' testimony.

cards of the customers and Harwell transferred certain ones to Driver.[10]

This is the first case, insofar as I am aware, in which the Board has been confronted with the issue of whether sales supervisors, or persons having similar or corresponding positions, are supervisors within the meaning of the Act. In other cases the issue was not raised.[11] Upon the basis of the above findings, I conclude that the Respondent's sales supervisors are supervisors within the meaning of the Act. They responsibly direct the work of the men in their divisions. They make effective recommendations concerning the selection of full service drivers for weekend work and the transfer of full service drivers and cup route drivers to jobs as driver-salesmen. They also make adjustments in routes which affect the earnings of the men under them.[12] Moreover, even if they not be regarded as supervisors within the meaning of the Act, their activities discussed below are attributable to the Respondent. This is so because they are responsible for the success of the sales operations of their subordinates and they periodically accompany the subordinates to ascestain whether the Respondent's poli-

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[10] Harwell's version of the conversations is that he did not tell Driver that he would try to effect a transfer of Driver to the vacant route, that instead he told Driver that he would inform Wilbert Sales of Driver's desire to be transferred, and that in the later conversation he told Driver that two customers on the vacant route were being given to Driver upon the direction of Sales. I cannot accept Harwell's testimony that he told Driver that Sales had made the decision as to which customers were to be given to Driver. As recited below, this is not the only instance in which Harwell's testimony cannot be credited when in conflict with that of Driver.

[11] See *Seven-Up Bottling Company of Miami, Inc.*, 92 NLRB 1622; *Atlanta Coca-Cola Bottling Company*, 83 NLRB 187; *Coca-Cola Bottling Company of Louisville, Inc.*, 108 NLRB 490. In *Coca-Cola Bottling Company of St. Louis*, 94 NLRB 208, there was a question whether "subdivision supervisors" had lost their supervisory status upon being reclassified as "driver-salesmen" at the time of a strike.

[12] The sales supervisors are paid a weekly salary. The driver-salesmen work on a commission basis plus $2 per day, with a guarantee that each will be paid for 750 cases per week. In the instances of the driver-salesmen who have the most profitable routes, their annual incomes exceed those of the sales supervisors. The full service drivers also work on a commission basis with a proviso that each shall be paid on an hourly basis if his commission earnings during a workweek should be less than the hourly rate. The cup route drivers and the sales trainees are paid straight hourly rates.

cies are being carried out. Their positions identify "them with management in such a way as to cause the employees to look to them for guidance concerning the Respondent's policies." *Harrison Sheet Steel Co.*, 94 NLRB 81, enfd. 194 F. 2d 407 (C. A. 7).[13]

D. The 1944 and 1948 elections

During 1944 and 1948, following the filing of petitions by the Union, consent elections were conducted by the Board. The *stipulated unit* in each instance consisted of the driver-salesmen alone. The Union lost the first
8860 election by a vote of 25 to 5 and the second by a vote of 36 to 2. The General Counsel contends that the outcomes of these elections, particularly the latter, were the result of unlawful conduct by the Respondent which undermined the Union's majority status. No objections were filed to the conduct of either election, however, and the General Counsel asserts that objections were not filed because the Union was unaware of the Respondent's alleged conduct until 1953. The General Counsel also contends that the Respondent's insistence upon an election in 1953, as recited below, was to gain time in which again to undermine the Union's majority status, and that the Union's refusal to agree to an election in 1953 was founded in its recently acquired knowledge of the Respondent's bad faith conduct in the earlier years. Evidence concerning the Respondent's alleged conduct in 1944 and 1948 was excluded, however, upon the Respondent's objection

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[13] The Respondent points out that the sales manager and his assistant, and the plant manager and his assistant, exercise supervisory authority over the approximately 58 driver-salesmen, full service drivers, cup route drivers and sales trainees, and the Respondent argues that a finding that the 12 sales supervisors also exercise such authority would result in an excessively high ratio of supervisors to sales personnel. In other industries the argument may be sound, but in the bottling, sale, and distribution of soft drinks the large number of supervisors is necessitated by the fact that the sales personnel spend most of their working time away from the plant, calling upon their numerous customers. As above recited, Keeler, a sales supervisor, testified that the only way in which to determine that a driver-salesman is performing his duties is to accompany him on his route.

early in the hearing, because I regarded as material the question why the Respondent insisted upon an election in 1953, which I thought should be determined upon the basis of events in that year, and as immaterial the question why the Union refused to consent to an election in 1953.

E. Events in 1953

On January 14, 1953, a number of the driver-salesmen met with representatives of the Union at a restaurant of one Benny Bortnick. There was considerable discussion concerning whether they should designate the Union to represent them, and in the course of the discussion Thomas Caton, the Union's business agent and secretary-treasurer, told the men that he did not care to act in their behalf unless they were determined not to repudiate the Union again. Before the meeting ended a large number of driver-salesmen signed applications for membership and it was agreed that Caton should contact the Respondent promptly.

On January 15, Caton telephoned Plant Manager Fiske and made an appointment for that day. That afternoon Caton, accompanied by other representatives of the Union, called upon Fiske and Assistant Plant Manager Lang. Caton said that he had met with "the men" on the preceding night, that he represented a majority of "the men," and he asked for recognition of the Union as their bargaining representative.[14] Caton also spoke of methods by which the Union's claimed majority could be proved, such as having the applications for membership examined by a disinterested person, but he expressed opposition to an election because the Union had lost the preceding elections. Fiske said that he was without authority to

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[14] It is clear that Caton claimed to represent a majority of "the men," but Fiske and Lang denied that Caton spoke of having met with the men. I credit Caton's testimony that he did so.

recognize the Union and that he would have to consult with his superior. During the meeting, Fiske asked what type of contract would be requested by the Union, and Caton produced a mimeographed form contract. Caton explained that a number of the Respondent's competitors were parties to like documents, that changes were being negotiated, and that the Union would request the same contract with some changes. There was a discussion of the form contract and Caton left a copy with Fiske.[15] Later that day Fiske talked by telephone with Fred I. Hobbs, the Respondent's secretary-treasurer and general manager, who was in the Respondent's main office in Richmond, Virginia.

Fiske told Hobbs of the visit by Caton, and Hobbs
8861 replied that the Respondent would not recognize the Union unless it won an election conducted by the Board. According to Hobbs' testimony, he told Fiske that "we had been through all that before, and we would insist upon having an election."

We turn now to the activity of certain sales supervisors. The place at which the driver-salesmen had met on January 14, Bortnick's restaurant, is located on Rhode Island Avenue in Northeast Washington. In the late afternoon of January 15, Robert Bland, a sales supervisor (not to be confused with Charles Bland, a driver-salesman mentioned below), spoke to one of the driver-salesmen under his supervision, Strandberg. Bland said that he understood there had been a meeting on Rhode Island Avenue the night before, and he asked what had taken place. Strandberg, who had attended the meeting, replied that

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[15] There is a dispute concerning whether Caton read the contract aloud. He testified that he did so. Fiske and Lang testified to the contrary. Fiske also testified that they "casually" went through the form contract "clause by clause." There are also disputes concerning the number of form contracts which were in use during the meeting and whether Caton specifically said that the form contract could not be executed. I do not believe that the testimony need be detailed and these disputes resolved.

he did not know of it.[16] Another sales supervisor, Harwell, telephoned one of his subordinates, Thompson, at the latter's home that evening. Harwell spoke of Caton's visit to the plant and asked if Thompson had heard anything concerning union activity. Thompson, who had attended the meeting at Bortnick's restaurant, responded in the negative. Harwell asked Thompson to try to ascertain something about the Union's strength the next morning, and to let Harwell know. Thompson agreed to do so. On the following day at the plant garage, Thompson told Harwell that the men were not talkative and that he had learned nothing.[17]

On or about January 16, John Watkins, a driver-
8862 salesman, was having coffee at a snack bar near the plant. He was joined by Tom Elliott, a sales supervisor. Elliott inquired what Watkins thought about the meeting which the driver-salesmen had held at Bort-

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[16] This finding is based upon the testimony of Strandberg. Bland testified that a conversation occurred, but his version of it differs. According to Bland, when he returned to the plant after working a route on January 15, he was told by John Burgess, a checker, who checked the contents of Bland's truck, that Burgess had heard that the Union had presented a proposed contract to the Respondent and that some of "the men" had "joined up" with the Union. Bland testified further that Burgess is a talkative person, that he placed little confidence in Burgess' comments, and that he did not discuss the matter with Burgess because he did not "discuss things of any nature down there with anybody if" he could "get away with it." Soon thereafter, according to Bland, he saw Strandberg and remarked that he had heard that some of "the boys" had had a meeting on Rhode Island Avenue and inquired whether Strandberg knew about it. Bland denied that he specified the preceding night as the date of the meeting and that he had in mind a meeting at Bortnick's restaurant. He testified that he did not know that there was a Bortnick restaurant on Rhode Island, Northeast, and that he used the words "Rhode Island Avenue" because he assumed, based upon Burgess' remarks that employees had joined the Union, that they met in the hall of a Teamsters' local union which is located on Rhode Island Avenue in the northwest section of the city. Bland's version of the conversation does not have the ring of truth.

[17] These findings are based upon the testimony of Thompson, a witness whose testimony has been credited above. Harwell sharply contradicted Thompson, denying that he telephoned Thompson on January 15, but his denials were unconvincing. He acknowledged that he had spoken with Thompson at the plant garage in the latter part of January, but he testified that he could not recall the date. According to Harwell, Thompson volunteered the comment that "the boys were 'mighty quiet this morning,'" to which Harwell replied that the reason might be because Caton had "been down with the contract." As recited elsewhere herein, Harwell's testimony is rejected in other instances also.

nick's restaurant, and Watkins, who had attended the meeting, replied that he knew nothing about it. Elliott then said that he thought the men were foolish and that the Respondent could do more for them than the Union.[18] On or about the day of the conversation between Elliott and Watkins, Elliott also spoke with James Patton, another driver-salesman. They were discussing their business for the day when Elliott said that it appeared that the men were "going to mess themselves up," to which Patton responded by asking what Elliott had in mind, and Elliott said that the men were "talking about going Union" and that if they did so they would lose their benefits.[19]

During the afternoon of January 16, Witczak, a sales supervisor, rode with Hensley on the latter's route. Witczak raised the subject of the Union by saying that he had been surprised to hear that a majority of "the boys" had joined it. Hensley, who had not attended the meeting at Bortnick's restaurant because of a prior engagement, but who knew of the union activity, replied that he did not know of it, that he had been "blackballed" by the Union,

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[18] The findings concerning this conversation are based upon the testimony of Watkins, a witness for the General Counsel. On the other hand, Elliott testified for the Respondent that he asked what Watkins thought of the Union's "trying to come in over at the plant," but he denied that he inquired about a meeting of the driver-salesmen, that he spoke of the men being foolish, and that he said that the Respondent could do more for them than the Union. I am unable to credit Elliott's testimony. In certain respects it will not stand the test of reason. For instance, notwithstanding a wide knowledge around the plant that the driver-salesmen had met, Elliott testified that it was approximately February 24 that he first learned that there had been a meeting. He testified also that on January 15 he was told by Burgess, the checker, that Caton had been to the plant with a "contract" or "papers" for Fiske to sign, and that Caton's visit was a common topic of conversation among the driver-salesmen, but that he did not discuss the subject with any sales supervisor or with any driver-salesmen other than Watkins. He also testified that between January 15 and 26, he did not discuss the Union with any of the sales supervisors or their superiors. As appears below, on January 26 a strike notice was given by the Union to the Respondent, and in the late afternoon and early evening of that day there was considerable activity in the plant in connection with the notice. The strike began on the next day. Elliott testified that he knew nothing about the strike until after it began.

[19] The findings concerning this conversation are based upon Patton's testimony. Elliott denied that the conversation occurred.

and that perhaps for that reason he had not been asked to join it. Witczak asked if Hensley knew who had initiated the activity, and again Hensley replied in the negative. Witczak said *inter alia* that the Respondent "had ways of finding out" and that in 1952 an employee, Kenneth Kurtz, had informed the Respondent of such activity.[20]

Witczak also said that five employees identified
8863 by Kurtz "had been taken care of," but Witczak did not clarify that remark.[21]

On January 16, Thomas Driver agreed to drive Keeler, a sales supervisor, to the latter's home after work and later that evening to a bowling alley where some of the employees were to bowl. As they left the plant that day,

[20] The findings concerning the conversation between Hensley and Witczak are based upon the former's testimony. Hensley testified also that Witczak said that he believed that the Respondent would sell the plant before it would recognize the Union, but Hensley was uncertain whether the remark was made in that or a later conversation. Hensley is one of the employees who went on strike on January 27 and later returned to work. He testified as a witness for the General Counsel. During the course of his testimony, the General Counsel sought to impeach him in certain respects by the use of a written statement which Hensley had signed. The statement was received in evidence for a limited purpose and the findings above are based upon the extensive examination of Hensley, not upon the statement. With respect to Witczak's version of the conversation, he testified that he learned of the organizational activity on January 15 when Burgess, the checker, said to him that Burgess had "heard about the men organizing," and that he did not make a reply. He testified also that Burgess asked if he had heard about the organizational activity, and that he replied that he had not heard anything. He testified further that the conversation with Hensley consisted of his saying that he understood Burgess had said "the men were organizing," that Hensley denied knowledge of it, that Witczak said that it was one of the rumors that Burgess "is always passing," that Hensley said that if the men were organizing it would not benefit him because he had been "blackballed from two unions," that Witczak said the rumor "must be one of those rumors that" Kurtz had circulated some months previously, that Hensley asked what Kurtz had said, and that Witczak answered that Kurtz had said that the men were meeting at the home of Robert Posey, a driver-salesman. In a later version, Witczak varied his testimony by saying that when he spoke of the "rumor" being like one which Kurtz had circulated earlier, Hensley said: "Yes, I think it is too," thereby indicating that Hensley already was aware of Kurtz' comments. Hensley testified credibly that he had been unaware of them.

[21] The record contains testimony by Kurtz concerning an occasion in 1952 when he disclosed to Witczak and Sales some information about meetings in connection with union activity which were being held at the home of Posey. Kurtz' testimony was offered by the General Counsel as "Background." There is also the testimony of Witczak and Sales concerning the occasion. I do not believe that it is necessary to set forth the testimony and to make findings of fact. It should be observed, however, that there is no contention by the General Counsel that the employees who met at Posey's home were discriminated against by the Respondent. Moreover, it is clear that Posey continued to work for the Respondent.

Driver said that he wished to buy some beer, and Keeler volunteered to get it while Driver went for his automobile. As Driver walked toward his automobile, he came upon his sales supervisor, Harwell, who was seated in the latter's automobile. Harwell asked Driver to get in the automobile, saying that he wanted to talk with Driver and offering a drink. Driver got in. Harwell said he understood that representatives of the Union had been to see Fiske, and he asked if Driver knew about it. Driver, who had been to the meeting at Bortnick's restaurant, professed ignorance, and Harwell commented that it was funny that Driver knew nothing. He asked that Driver let him know of anything that Driver heard. Harwell also asked why a union was needed, saying that he had seen the form contract which Caton had given to Fiske and that he thought the men would lose more than they would gain. Again Driver professed ignorance. About this time Keeler, in search of Driver, came upon the scene. He got in Harwell's automobile, and once more the Union was mentioned and Driver said that he did not know of the activity. Soon Keeler and Driver left Harwell and went to Driver's automobile.[22] They drove to Keeler's home, from which Driver continued to his own

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[22] The findings concerning this conversation are based upon the testimony of Driver. As already recited, I have previously credited Driver's testimony when in conflict with that of Harwell . The latter's testimony in this instance is sharply at variance with Driver's testimony. Harwell testified that he called Driver to his automobile in order to discuss the loss of bottles at one of Driver's customers, that the conversation was substantially about that matter, that he did offer Driver a drink which Driver accepted, that after Keeler arrived Keeler also had a drink, and that the only reference to the Union was his comment that he had heard of Caton's visit to the plant with a "union contract," which was followed by Driver's disclaimer of knowledge, to which Harwell answered that he knew nothing about it either except that it was a rumor around the plant. Keeler's testimony supports that of Harwell. He testified that there was no reference to the Union while he was in Harwell's automobile and that he heard Harwell and Driver discussing the loss of bottles. I discredit the testimony of Harwell and Keeler. According to Harwell, the matter of the bottle losses was brought to his attention that afternoon, and it is a reasonable inference from his version of the conversation with Driver that he had discussed the matter with Sales Manager Sales. I believe that if Harwell had wished to discuss lost bottles with Driver he would have made it a point to see Driver before they left the plant for the weekend. It is more reasonable to conclude, in accord with Driver's testimony, that Harwell wanted to discuss the union activity.

home. He returned with his wife, got Keeler, and
8864 the three persons drove to the bowling alley. After bowling they went to a nearby restaurant for refreshments, following which the Drivers took Keeler to his home. Enroute, Keeler asked if Driver knew anything about the union activity, and Driver answered in the negative. Keeler said that "the man from Richmond," Virginia, a reference to the Respondent's principal office, might close the plant and that Keeler and Driver would "be out on the street." Keeler asked Driver what complaints the men had, and Driver replied that they wanted a higher rate of pay and that they were dissatisfied with the allowance they received for culls, which are unsaleable bottles of coca-cola. Keeler suggested that the complaints should be handled by the men themselves calling upon Fiske. Driver said that he did not think the men were much interested in the Union, and Keeler asked if Driver would be at home 2 days hence, a Sunday, saying that Keeler might take Driver to see "the man" or "the old man," terms which are used at the plant to refer to Fiske. On Saturday, Driver told Caton, the Union's business agent, of the possible forthcoming conversation with Fiske. Keeler did not call upon Driver over the weekend, however.[23]

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[23] These findings are based upon Driver's testimony. Mrs. Driver was not a witness. Keeler disputed Driver's testimony in detail. According to Keeler, there was no reference to the Union whatsoever. He testified that the subject of culls arose when they were having refreshments after bowling, that Driver brought up the subject by saying that he thought the arrangement concerning culls was unfair to the driver-salesmen, some of whom were dissatisfied, and that Keeler replied that he could suggest only that Driver take up the matter with Fiske. In this instance, as elsewhere herein, I cannot credit Keeler's testimony. His demeanor as a witness contrasted sharply with that of Driver. Illustrative of Keeler's unreliability are the following incidents. *First*, he testified that it was late on January 16, the day of his conversation with Driver, that he first heard of Caton's visit to the plant. Although the subject appears to have been well known in the plant for approximately 24 hours, Keeler testified that his information came from Burgess, the checker who, according to the Respondent's witnesses, appears to have made it a point to be the bearer of the news to various sales supervisors. *Second*, Keeler testified that between January 15 and 26 the only person with whom he had any conversation in the plant about the Union is Burgess. *Third*, on January 27, the first day of the strike which is discussed below, there was a meeting in the plant which was attended by admitted supervisors, the sales supervisors,

On Monday, January 19, Plant Manager Fiske
8865 and Business Agent Caton talked by telephone.

Fiske had agreed at their meeting on January 15 to contact Caton after talking with General Manager Hobbs, but he had not done so.[24] During the morning of the 19th, Caton called the plant and was told that Fiske was not available to the telephone. Later that morning, Fiske returned the call. He told Caton that Hobbs wanted an election.[25] During the conversation, Caton said to Fiske, "Well, let's keep the thing clean," and informed Fiske that Keeler had "one of . . . [the Union's] members . . . out drinking, and he [the employee] was supposed to go around and talk against the union." The reference was to the above-described conversation between Keeler and Thomas Driver, but Caton did not mention Driver's name to Fiske. Fiske said that he did not know anything about

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and other nonstriking sales personnel. Keeler was present, but he testified that he could not recall what was discussed at the meeting, other than the assignment of routes to be worked that day, and specifically that he could not recall whether management asked the "boys" to try to persuade the strikers to return to work, whether management indicated that it was surprised at the number of men who had not reported for work, and whether the sales supervisors were asked to solicit some of the strikers to return to work. *Fourth*, during the hearing a question arose as to whether certain Negro employees attended the general sales meetings. Keeler testified that at most of those meetings he called the roll, but that he could not recall whether the Negro employees had been in attendance. This professed inability to remember whether the Negroes attended is incredible in the instance of one who calls the rolls, and the professed faulty memory regarding the January 27 meeting contrasts with a professed vivid memory in other instances.

[24] This finding is based upon the testimony of Caton. On the other hand, Fiske's testimony is self-contradictory. He testified that he did not agree to call Caton, that instead Caton agreed to call him, and that he waited for a call from Caton. The hearing was an extended one, and 2 weeks after so testifying, Fiske testified that he had agreed to call Caton and that on January 16 he sought unsuccessfully to reach Caton by telephone, but that he did not leave a message that he had called.

[25] There is a conflict in the testimony concerning whether Caton asked Fiske how Caton could get in touch with Hobbs and whether Fiske replied that he did not know Hobbs' whereabouts. I deem it unnecessary to set forth this testimony and to resolve the conflict. It suffices to find that, although the Respondent asserts that Hobbs, rather than Fiske, was empowered to represent it, Hobbs was at the plant on both that day and the next, at which time he gave attention to the subject of the employees' organizing, but he did not contact Caton, or so far as there is evidence, make any attempt to do so.

it.[26] Thereafter Fiske did not direct Keeler to cease interrogating the driver-salesmen concerning the union activity. Nor, insofar as it appears, did he so direct
8866 any other sales supervisor.

On January 19 and 20, Hobbs was at the plant. He and Fiske discussed the Union's demand for recognition. At that time there was being prepared an address to be delivered by Fiske at a general sales meeting on January 21. Hobbs read and approved it. It is referred to below in a recitation of events at that meeting. As recited in footnote 25, Hobbs did not contact Caton during his visit to Washington.

On or about January 19, Fiske spoke with William O'Malley, a driver-salesman. Fiske asked if O'Malley had heard anything about the union activity, and O'Malley, who had attended the meeting at Bortnick's restaurant, answered in the negative. Fiske said that a union representative had given him a contract which was ridiculous, and he pointed to a provision to which he said that he could not agree. O'Malley said that he did not care about the Union, that it had been "here before" and that "it didn't mean anything."[27] The conversation ended with Fiske's remark that "we are going to have a [general sales] meet-

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[26] The finding that Caton spoke of Keeler's conversation with Driver and said to Fiske to "keep the thing clean" is based upon Caton's testimony. On the other hand, Fiske denied that the fact that employees were being questioned by supervisory personnel was ever brought to his attention and that Caton complained about such questioning. Fiske also testified that it was not until after the strike began that Caton spoke of keeping "the thing clean." For reasons which are detailed below, I cannot credit Fiske's testimony. Moreover, I do not believe that Caton, having been informed of the questioning of employees, would have waited until after the strike began to speak of keeping "the thing clean."

[27] The findings in this paragraph are based upon the testimony of O'Malley who impressed me as a truthful witness. Fiske testified that the conversation did not occur. In connection with Fiske's testimony at pages 7691 *et seq* of the transcript, the name "O'Malley" is spelled "O'Neil." This misspelling is hereby corrected.

ing during the week," which he accompanied by a wink of the eye and the comment, "The Irish like to talk."[28]

On or about January 21, Keeler met one of his subordinates, Francis Maynard, on the latter's route.[29] The General Counsel asserts that upon this occasion Keeler engaged in unlawful interrogation, but I do not so find for reasons set out in the footnote.[30]

On January 21, the Respondent held a general sales meeting.[31] Fiske delivered the prepared address mentioned above. He spoke *inter alia* of certain benefits which em-
ployees received; of the necessity that the stock-
8867 holders receive a profit upon their investment; of
an instance in Pittsburgh when an employer complied with union demands and suffered a loss of $75,000, which was followed by a lengthy strike; and of the

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[28] As recited above in Section III, D, evidence concerning the Respondent's alleged conduct in connection with the elections in 1944 and 1948 was excluded. Some of this evidence was offered through O'Malley in explanation of the meaning to him of Fiske's wink and remark that there would be a meeting and that "The Irish like to talk."

[29] Maynard fixed the date as about a week after the meeting at Bortnick's restaurant. Keeler fixed the date as sometime during January.

[30] As recited above, the driver-salesmen are compensated on a commission basis. The rate is 8 cents per case of coca-cola, and there is a guarantee that each driver-salesman will be paid for a minimum of 750 cases per week. The question here is whether Keeler asked Maynard how many men were "griping" about drawing guarantees and whether Maynard was being compensated on the guarantee basis. Keeler denied that he so inquired. Maynard contradicted himself by testifying that Keeler did, and did not, inquire how many men were being paid at the guaranteed rate, as distinguished from how many men were griping about being so paid. Moreover, as set out in footnote 38, Maynard gave conflicting testimony in another instance. Although I believe, for reasons set forth herein, that Keeler's testimony cannot be credited, I am constrained to reject Maynard's unsupported testimony in this instance, and I find that the General Counsel has not sustained his burden of proof.

[31] According to Fiske, the general sales meetings are ordinarily held on alternate Wednesdays and the January 21 meeting was scheduled 2 weeks prior to January 21, and thus prior to Caton's visit to the plant. According to Assistant Plant Manager Lang, the schedule of meeting is generally "set up in the fall," and the date of the January 21 meeting was "probably" fixed in the autumn of 1952. I do not credit the testimony of Fiske or Lang in this respect. I make no findings as to when the January 21 meeting was originally scheduled. I do find, however, that there was no general sales meeting between the nearly part of December and January 21. I find too that the Christmas and New Year holiday season furnished a good reason for dispensing with general sales meetings during some of that period.

Respondent's sound merchandising practices. Following delivery of the address, Fiske brought up the subject of culls, which are unsaleable bottles of coca-cola. At that time the Respondent's practice was to allow each driver-salesman 24 culls per week; that is, a driver-salesman, after receipt of culls from customers, returned the culls to the plant and received credit therefor to the extent of 24 per week. If, however, the number returned by a driver-salesman in any week exceeded 24, as, for instance, when customers allowed culls to accumulate before delivering them to the driver-salesman, the driver-salesman was required to pay for the excess number at 5 cents each. In bringing up the subject of culls, Fiske knew that there was dissatisfaction among the driver-salesmen about the matter. He testified that he had discussed it with Wilbert Sales and "several of the men" and had learned that some of the employees "were all stewed up about it." After he brought up the subject at the meeting, a discussion ensued. It ended with the announcement of a new policy whereby each driver-salesman would continue to be allowed 24 culls per week, but the settlement would be on an annual rather than a weekly basis unless the driver-salesman's employment was terminated within the year, in which event settlement took place upon such termination. Under the new arrangement, a driver-salesman who had less than 24 culls in any 1 week was permitted to carry over the difference into a subsequent week. The new arrangement met with the approval of the driver-salesmen. Fiske next brought up the subject of the time of day at which the general sales meetings should be held. The practice was to hold them at night. Fiske testified that he brought up the subject because some of the men disliked having to return to the plant during the evening for a meeting, or having to remain at the plant after work awaiting a meeting, that he was "simply trying to make things a little easier all around," and that a morning meeting could be

held in less time than an evening meeting.[32] In this connection, it should be noted that the mimeographed form contract which Caton had given to Fiske on January 15 provides that sales meetings be held during working hours unless otherwise mutually agreed. Following the raising of this subject, another discussion ensued. It ended with a roll call vote in which a majority voted to hold the meetings in the mornings, and the vote was made unanimous. This general sales meeting ended. With respect to the subjects of this meeting, Fiske acknowledged that his prepared address was related to the visit by Caton on January 15, but he testified unconvincingly that there was no relationship between the subjects of culls and the time of meetings, on the one hand, and the organizational activity, on the other hand.

On January 22, Fred Wolfe, a driver-salesman, talked with Baum, his sales supervisor. Baum had been absent from work for several days because of illness. Baum asked if Wolfe had heard anything of the union activity, and Wolfe, who had attended the organizational meeting at Bortnick's restaurant, answered "no, it was probably just a bunch of scuttlebutt." Baum responded that he hoped so.[33]

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On an undetermined date between January 16 and 23, inclusive, Donald Linthicum, a driver-salesman, talked

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[32] There is a conflict in the testimony concerning whether Fiske brought up the subjects of culls and the time of meetings or whether he called for the expression of grievances, following which driver-salesmen mentioned the two subjects. The finding that Fiske raised the subjects is based in part upon his own admissions.

[33] There is no substantial conflict in the testimony of Wolfe and Baum as to the conversation as found above. There is, however, a conflict as to whether Baum asked Wolfe to let Baum know of anything Wolfe heard. Wolfe testified, and Baum denied, that Baum made that request. Although Baum's testimony in certain respects is subject to disbelief, I do not discredit his denial in this instance. Wolfe twice testified that the conversation was as found above and it was only after a leading question that he attributed such request to Baum. Under all the circumstances, I reject Wolfe's testimony in this respect.

with Everhart in the plant garage.[34] Everhart said to Linthicum that Linthicum had asked him a lot of questions and that he wanted to ask one of Linthicum, who answered "Sure, go ahead." Everhart then asked if Linthicum had heard anything of the organizational activity, and Linthicum, who had signed an application for membership, answered in the negative. Everhart asked Linthicum to keep his "eyes and ears open" and to let Everhart know of anything which Linthicum heard. Everhart said too that "We don't want the union to get in here and take away the benefits that we have. . . ."[35]

As mentioned above, some of the Respondent's employees are accustomed to bowl on Friday nights. January 23 was an occasion for bowling. It was also an occasion for a union meeting. During the early evening of that day, as James Bennett, a driver-salesman, was preparing to leave the plant, his sales supervisor, Keeler, suggested that they have a drink after leaving the plant. Bennett agreed. Maynard, who was going to accompany Bennett that evening, was present. Shortly thereafter, Keeler, Bennett and Maynard talked in Bennett's automobile near the plant.[36] The conversation lasted over 1 hour, during

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[34] Linthicum could not fix the date of the conversation except by reference to the meeting at Bortnick's restaurant, to the following day upon which he signed an application for membership, and to the date upon which the strike began, January 27. Since Linthicum did not work on January 26, a Monday, the conversation must have occurred on the preceding Friday, January 23, or earlier.

[35] These findings are based upon the testimony of Linthicum, who testified convincingly about the conversation. On the other hand, Everhart denied that the conversation took place. As recited above in connection with the question whether sales supervisors are supervisors within the meaning of the Act, Everhart gave self-contradictory testimony. I discredit his testimony here.

[36] The finding that Keeler suggested that they meet for a drink is based upon the testimony of Bennett and Maynard. Keeler testified, on the other hand, that he asked Bennett to drive him to the bowling alley and that Bennett then suggested that they get a bottle of whiskey. I cannot credit Keeler's version. It is clear from the testimony of Bennett and Maynard, as related in the body of this Report, that it was later in the evening that Keeler asked that he be driven to the bowling alley. Moreover, Keeler testified that he had been "killing a little time," perhaps as long as "a couple of hours," waiting to get a ride to the bowling alley, before he spoke to Bennett and that during that time he had not asked any member of the "Coke" bowling team or anyone else to take him to the bowling alley. Bennett was not a member of the team and he did not intend to go to the bowling alley. The fact that Keeler made no effort to get a ride to the bowling alley with anyone other

which the union activity was discussed.[37] The testi-
8869 mony is in conflict concerning who broached that subject and what was said about it. I find, for the reasons set out in the next footnote, that Keeler asked what the employees expected to gain by organizing, that Keeler referred to strikes which had taken place at other coca-cola bottling companies and said that the strikers had suffered, and that Keeler said that the Respondent would close its Washington plant before it would recognize the Union.[38] As the hour of 9 o'clock approached, Keeler

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than Bennett, although, as he testified, Bennett was one of the latest driver-salesmen to come in from the routes that day, warrants the inference that Keeler was interested in talking with Bennett rather than in achieving a ride to the bowling alley.

[37] Bennett testified that the conversation lasted for "approximately an hour and a few minutes." Maynard fixed the time as about an hour. Keeler fixed it as 20 to 25 minutes. Certain testimony by Keeler supports the estimates of Bennett and Maynard, however. Thus, Keeler testified that it was "about seven o'clock" when he spoke to Bennett in the plant; that, indeed, he "didn't wait until seven o'clock, come to think about it," before speaking to Bennett. Keeler testified also that about 10 minutes thereafter he left the plant and joined Bennett and Maynard in the automobile and that, later, when it "was getting close to 9 o'clock," the time at which bowling began, he suggested that they go to the bowling alley. Thus, according to Keeler, the conversation necessarily consumed much more than 20 to 25 minutes. There is also contrary testimony by Keeler, however. After testifying that he talked with Bennett shortly before 7 o'clock, "come to think about it," Keeler testified that he first spoke to Bennett about 8 o'clock.

[38] The findings concerning Keeler's remarks are based upon the testimony of Bennett and Maynard. Bennett testified that the subject was broached by Keeler. Maynard testified that he did not know who broached it. Keeler testified that Bennett broached it. Keeler's version of the conversation is that Bennett said, "I see Caton was down to the plant" and asked whether Keeler thought "the boys would be better off in the union" or "the company be better off in a union or not," that Maynard later also asked whether Keeler thought "the boys would be better off in a union," that Keeler answered that he did not know what benefits the Union offered, that it was Bennett who spoke of a strike in Pittsburgh which lasted 16 months, that Bennett also spoke of strikes in Cumberland and Baltimore, and that Keeler knew of the strike in Pittsburgh but not of the other two strikes. Thus, the testimony of Keeler differs in the matter of who broached the subjects, as well as in what was said. He also denied that he asked what the Respondent's employees expected to gain by organizing and that he said that the Respondent would close the Washington plant before recognizing the Union. I cannot credit Keeler's testimony. See footnote 23. Moreover, it was Keeler, and not they, who suggested they meet after work. As will be seen, Bennett and Maynard intended to go to a union meeting that night, a fact which they did not disclose to Keeler, and I do not believe they would have broached the subject of union activity. With respect to the testimony of Maynard, he contradicted himself when testifying both ways as to whether Keeler inquired whether the Respondent's employees could stay out on strike for 16 months. While this contradiction makes it necessary to evaluate Keeler's denial that he made the inquiry, and precludes a finding that the inquiry was made, I find that in other respects the testimony of Maynard generally supports that of Bennett.

asked Bennett to drive him to the bowling alley. Bennett agreed to do so. Bennett and Maynard intended to go to the union meeting which was scheduled for that night, but they did not tell Keeler of the meeting, preferring that he not know of their attendance. They left him at the bowling alley and continued on to the meeting, being some minutes late.

The "Coke" bowling team consisted of Keeler, as
8870 captain, and Thomas Driver, Watkins, Wolfe, and Anthony Clements. Clements was at the bowling alley in advance of the time to bowl, and he testified credibly that he did not atend the union meeting because he did not wish to incite Keeler's suspicions by not being at the bowling alley.[39] During the evening, as Keeler and Clements had refreshments, Keeler asked if Clements "knew anything about what was going on," and Clements replied that he knew no more than did Keeler. Keeler spoke of the strike in Pittsburgh which, so he told Clements, had lasted for 16 months, and he said to Clements that the Respondent would close the Washington plant if "the boys went on strike or joined the union . . . and they would all be out of jobs."[40]

The union meeting on January 23 was attended by employees who had signed applications for membership in the Union on January 14 or thereafter. Business Agent Caton gave a report concerning his dealings with Plant Manager Fiske. Following a discussion, it was unanimously agreed

[39] Wolfe, who had applied for membership in the Union on January 14, was also at the bowling alley. Driver went from the union meeting to the bowling alley.

[40] These findings are based upon the testimony of Clements. On the other hand, Keeler testified that the subject of the Union was broached by Clements who said, "I see Mr. Caton was down [to] the plant." As recited in footnote 38, Keeler testified that Bennett brought up the subject in substantially the same words. According to Keeler, the conversation with Clements consisted of inquiries by each to the other as to what they knew about it, with each replying that he knew nothing. Keeler denied that he spoke of a strike in Pittsburgh and of the Washington plant's being closed. Again I reject Keeler's testimony. Moreover, I do not believe that Clements, who applied for membership in the Union upon the occasion of the meeting at Bortnick's restaurant, and who refrained from attending the union meeting of January 23 in order that Keeler not be suspicious, would have sought to engage Keeler in a discussion about the demand for recognition.

that Caton should call upon Fiske on the next workday, Monday, January 26, to seek written recognition of the Union and that a strike would commence on January 27 if recognition were denied.

On January 26, Caton telephoned Fiske and requested an appointment.[41] It was set for 2 o'clock that afternoon. Prior to that hour, however, the sales manager and the assistant sales manager, Wilbert Sales and Riviello, interrogated O'Malley, and the circumstances of that interrogation will be related before we discuss the meeting
8871 between Caton and Fiske. During the noon hour of that day, O'Malley came to the plant from his route in order to obtain a second truck load of coca-cola. Sales walked over to O'Malley and said that a complaint of failure to serve had been received from one of O'Malley's customers, J. J. Haines & Co., and he asked O'Malley why O'Malley had not served the account. O'Malley answered that the person at the Haines establishment who paid for the coca-cola had been absent upon occasions when O'Malley had called there and, since no one else would pay for the product, O'Malley had not left it. Sales then said that he wanted to talk with O'Malley "man to man," and he asked where O'Malley would stop on O'Malley's route after leaving the plant. O'Malley gave the name and address of a delicatessen, and Sales said that he would meet O'Malley

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[41] The record contains conflicting testimony concerning whether, in the telephone conversation on January 19, Fiske and Caton made a tentative engagement for January 21, whether that engagement was cancelled by Fiske, and whether he and Caton had a telephone conversation on January 21. It would lengthen this Report unduly to recite the detailed conflicting testimony and to resolve the conflicts, which I deem unnecessary to a disposition of the basic issues herein. The General Counsel asserts, and the Respondent denies, that in a telephone conversation on January 21, Caton protested an effort by Fiske to get a driver-salesman, O'Malley, to speak against the Union at the general sales meeting which was held that evening, as described above, and that Caton also claimed to represent a substantial majority of the driver-salesmen. As I view the sizable record in this case, Caton's claim to represent a majority of the driver-salesmen was expressed with sufficient clarity and was understood by the Respondent before the strike began on January 27, although on January 15 Caton had spoken only of representing a majority of "the men." Caton also, before January 21, had protested the conduct of Sales Supervisor Keeler. All of Caton's alleged claims and protestations need not be detailed.

there.[42] After O'Malley had returned to his route and had served "a couple of" customers, but was still in the immediate vicinity of the delicatessen, Sales and Riviello drove up in an automobile and parked behind O'Maley's truck.[43]

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[42] The findings concerning this conversation are based upon the testimony of O'Malley. In addition, Andrew Keyes, an employee, testified credibly for the General Counsel that he checked the load on O'Malley's truck and that he observed Sales in conversation with O'Malley. Both O'Malley and Keyes fixed the time as between noon and 1 o'clock, and it appears from other portions of O'Malley's testimony that the time was nearer 1 o'clock. On the other hand, Sales denied that the conversation occurred in the plant. He testified that he talked with O'Malley about the Haines account when he saw O'Malley on the latter's route that afternoon, that he had no appointment to meet O'Malley on the route, and that he drove along the route until he found O'Malley in order to discuss the Haines complaint. Sales also testified, as set out in the next footnote, that he and Riviello left the plant at about noon to keep an appointment at Sears, Roebuck & Co., and if this testimony, which is supported by that of Riviello, be credited, it is apparent that Sales could not have been in the plant when O'Malley received his second load of coca-cola. For reasons which will appear, however, I discredit Sales' and Riviello's testimony.

[43] Sales' explanation for meeting O'Malley on the route is that he had received the Haines complaint that morning, that it was the latest in a series of complaints from the Haines Company, that he had an appointment at a Sears, Roebuck & Co. service station, herein called Sears, which was located in the area of O'Malley's route, and that Sales decided to keep the appointment and then to search for O'Malley along the route in order to discuss the complaint. This explanation is unpersuasive. Sales twice testified that the appointment at Sears was for 1 o'clock. He testified also that he and Riviello left the plant "around noon" for the approximately 15-minute drive to Sears and that they arrived early. On cross-examination, Sales explained that he had not attempted to find O'Malley before going to Sears because "As a matter of fact" the Sears' official had set the time as "around one, which could mean 12:30 to one." Sales testified further that before leaving the plant he asked a checker whether O'Malley had come back for a second load of coca-cola, and that the checker examined a book and said that O'Malley had not been in. In relating the alleged conversation with the checker, Sales several times used the pronouns "he" and "him" in reference to the checker. The Respondent has several checkers, but Sales was unable to identify the particular one by name or sex. With respect to the appointment at Sears, Sales testified that he and Riviello were told by a Sears' clerk that the man with whom they had the appointment had been called away to a meeting and likely would not return for the appointment, and that a about 1:15 o'clock, the man not having returned, Sales and Riviello went to a restaurant for lunch. Sales could not identify the clerk, but testified that he believed him to be "a very heavy set fellow" with whom Sales had "done business . . . many, many times." Sales' testimony is supported in large measure by that of Riviello, who testified also that upon leaving Sears they told the Sears' employee with whom they had talked that they would return later. According to Riviello, when he and Sales were having lunch after leaving Sears, he told Sales that it would be a good time to locate O'Malley and "give him that order" for coca-cola at the Haines Company. I cannot credit the testimony of Sales and Riviello. I have previously found that Sales discussed the Haines matter with O'Malley in the plant earlier that day. Moreover, it was standard practice for the driver-salesmen to telephone the plant each day, after serving the last customer on a route, so that the driver-salesmen could fill any telephone orders which had been received. It would

They invited O'Malley to get in the auto, and he did so. A conversation ensued.[44] Sales asked what O'Malley
8872 knew about the strike which had been scheduled for the next day, and O'Malley professed disbelief. Sales asked whether O'Malley would strike, and O'Malley replied that he did not know and commented, "Why doesn't someone do something about it." Sales then said that O'Malley could do more about it than anyone, adding that a strike would be harmful to the Respondent.[45] O'Malley asked who should be blamed for the strike or the organizational activity, and Sales said *inter alia* that the Respondent had been good to him, that it was the Respondent's policy "to never knuckle down on the Union" and that "if they did go Union, the management would lose their jobs." O'Malley said that it was time the employees received a wage increase and that in 1948, when the driver-salesmen voted overwhelmingly against the Union, the Respondent had not shown "gratitude" by giving a wage increase. O'Malley continued by saying that the men felt that they were "just a lot of suckers," that driver-salesmen for competitors, including a bottling company known as 7-UP, had shown him income tax returns which reflected higher earnings, that he had worked for the Respondent for 14 years, and that he was on "a one-way street" which was "getting narrower." O'Malley asked why Sales did not make an

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have been in keeping with this practice for O'Malley to have been given the order by telephone, and any discussion with Sales concerning it could have been taken up after O'Malley returned to the plant at the end of the day. Finally, according to the testimony of Sales and Riviello, the matter to be discussed at Sears was of sufficient importance to require the presence of both Sales and Riviello. Nevertheless, they did not return to Sears that day, but went directly to the plant after talking with O'Malley, and while en route there they did not discuss the Sears matter. In this connection it is a reasonable inference from their testimony that they did not know of the strike which was set to begin on the next day, and thus the prospective strike should not have constituted a reason for them to return directly to the plant.

[44] At various places in the testimony concerning this conversation, "O'Malley" and "O'Malley's" are incorrectly spelled as "O'Neil" and "O'Neil's," respectively. The transcript is hereby corrected.

[45] As recited in Section III, D, above, entitled "The 1944 and 1948 elections," I excluded testimony concerning alleged conduct by the Respondent during those years. Some of this testimony was offered through O'Malley who, according to the General Counsel, was active in persuading the employees to vote against the Union in the latter election.

offer to the employees, and Sales said that it had "gone past that now" and that O'Malley could do more than Hobbs, the general manager. Sales said also that Fiske refused "even to think", and that "Old Lady Crass,"[46] 8873 being too old to understand, would say: "let them strike." Sales asked, "If there is a strike down there tomorrow, . . . you will go through that line, won't you?", and O'Malley answered that he did not know, that he never went through picket lines. Sales said that O'Malley could cross the line if O'Malley was not a union member, and asked if O'Malley was a member. O'Malley answered, "No." The conversation ended.[47]

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[46] According to the testimony of Fiske, James E. Crass, now deceased, was the founder and owner of a number of bottling plants, including the plants now owned by the Respondent corporation, which were known as the "James E. Crass plants." Hobbs, the Respondent's general manager, is also general manager of the current James E. Crass plants.

[47] The findings concerning this conversation are based upon the testimony of O'Malley, which has the ring of truth. He testified that he was irritated by having been kept from his work for more than an hour and that the Haines matter was not discussed on this occasion. The version of the conversation as related by Sales and Riviello must be rejected. According to their testimony, Sales asked O'Malley about the Haines account and O'Malley, who had never before been sarcastic, discourteous or uncooperative, appeared to resent Sales' inquiry but agreed to make an effort to serve the account that day. Thereupon, so they testified, O'Malley said that there were some things which were worth discussing, and he embarked upon a recitation of grievances, in which discussion he became belligerent. He began by saying that the Respondent's driver-salesmen had dipped to a new low; that instead of earning more money than driver-salesmen for competitors as in years past, a 7-Up driver-salesman in O'Malley's territory was earning more than O'Malley; to which Sales answered that O'Malley had certain advantages over competing driver-salesmen and that Sales could not believe that they had larger earnings than O'Malley; that O'Malley responded by saying that he had seen the driver-salesman's income tax return, that O'Malley continued by saying that "the old woman down in Richmond," or "the damned old woman," (a reference to Mrs. Crass) could "well afford to pay the union scale of wages", but the Respondent was "a cheap organization" which had ceased giving chicken dinners, picnics, and fishing parties for the employees. At this point, according to Sales and Riviello, Sales spoke of benefits which the Respondent's employees received, to which O'Malley responded that Fiske was living in the past and that "the men [driver-salesmen] were a bunch of suckers for voting" against the Union in 1948, which prompted Sales to say that O'Malley sounded "like a union man", to which O'Malley responded in the negative, that Sales then asked what would be O'Malley's "stand" if the situation should develop into a strike, that O'Malley answered that it would not develop to that point if Sales would talk to the men, that Sales responded that the matter had gone too far, and that the conversation ended with each agreeing that he had work to do. O'Malley returned to work, and Sales and Riviello went directly to the plant. This version of the conversation stretches one's credulity. Aside from the unconvincing testimony that Sales did not see O'Malley in the plant at about the

While Sales and Riviello were talking with
8874 O'Malley, Caton and other union representatives were talking with Fiske and other management representatives at the plant. Caton presented to Fiske for the latter's signature a single paragraph document as follows:

> THE COCA-COLA [sic] BOTTLING WORKS, INC. at 400 7th Street, S. W., Washington, D. C. agrees to recognize the . . . [Union] as sole labor organization representing the drivers and driver-salesmen for the purpose of collecting bargaining.

Following the quoted paragraph, space was provided for the signature of representatives of the Respondent and the Union. Caton's demand that Fiske sign the document was accompanied with a renewed claim of majority status coupled with the statement that Fiske's failure to sign would result in a strike the next day. Fiske said that he did not have authority to sign. A discussion followed, and Fiske telephoned General Manager Hobbs at the latter's office in Richmond, Virginia. Fiske explained the situation

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noon hour, that the Haines matter was one which could not be handled normally, and that there was an appointment at Sears, I do not believe that O'Malley, who chose to deny his affiliation with the Union, and who was a pleasant and cooperative employee, would have resented an inquiry about the Haines account and would then have embarked upon a belligerent criticism of the Respondent which could serve no useful purpose, but which resulted in O'Malley's being distracted from his work. Moreover, Sales' and Riviello's credibility on other aspects of this case is highly doubtful. As discussed below, after Caton made his strike threat on January 26, many driver-salesmen were questioned individually concerning whether they would go on strike. Riviello testified that he first observed the employees being called in for these interviews at 3 o'clock or soon thereafter, which was about the time that he and Sales returned to the plant after talking with O'Malley. Riviello also testified, however, that it was about 5 o'clock when he first "saw those salesmen going into that office" and that he "did not see them [going into an office for an interview] at three o'clock." He testified too that because he was "a little curious" about seeing the men being called into the office, he remained at the plant until after 8 o'clock in order to learn why they had been interviewed, that thereafter he and Keeler, O'Malley's sales supervisor, rode home together, and that the ride was in silence except perhaps for a comment about an undisclosed news item which may have been received over the automobile's radio. Riviello also testified that in the period of January 16 to 25, inclusive, he had no discussion with any representative of management concerning the Union, and that, although he rode with Keeler "practically" every morning, he and Keeler did not discuss the subject because he does not "discuss those things." It is inconceivable to me that Riviello, the plant's assistant sales manager, should have chosen to remain in ignorance of the organizational activity.

and read the document to Hobbs, who told Fiske not to sign it. After the conversation with Hobbs, the meeting ended with the Union's reiteration of the strike threat.[48]

After leaving Fiske's office, Caton went to the
8875 offices of the Union's counsel and talked with Attorney Walsh. A letter, dated that day from the Union to the Respondent, attention of Fiske, was prepared in the following language:

> This is to confirm the demand of . . . [the Union] for recognition as the collective bargaining agent of drivers and driver-salesmen employed by your Company.
>
> We further wish to confirm our prior statement that we represent an overwhelming majority, i.e., 39 out of 46, of the drivers and driver-salesmen. Nothwithstanding our demand for recognition and our representation of these employees, you have on repeated occasions over the past ten days, refused to bargain.
>
> Therefore, this is to notify you of our intention to strike effective immediately and file unfair labor practice charges for your refusal to bargain.

At about 4 o'clock, Caton returned to the plant with the letter, but he found that the door which served as the public entrance was locked. He went to a telephone and called Walsh, who advised him to put the letter under

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[48] Certain conflicts in the testimony concerning the meeting need not be resolved. The materiality of the conversation lies in the renewed demand and its rejection, as found above. The fact that Caton accompanied his demand that Fiske sign the document with a strike threat is clear from his testimony and that of Hall, the plant's advertising manager. Hall testified that Caton said that Fiske could sign the document or "count the men in the picket line." There is testimony by the union representatives that they asked to be permitted to speak with Hobbs when Fiske had Hobbs on the telephone, and that Fiske denied the request. On the other hand, the Respondent's witnesses, with the exception of Hobbs, testified that the union representatives were offered, but declined, an opportunity to speak with Hobbs, and Fiske testified also that Hobbs answered in the affirmative when Fiske asked if Hobbs would speak with them. Hobbs, who of course could not overhear the conversation between Fiske and the union representatives, testified after the subject was brought to his attention by a leading question, to which objection was sustained, that he could not recall that anything was said in the conversation concerning whether he would talk with the union representatives and that he did not refuse to speak with them.

the door. He did so, and the Respondent found the letter later that day.[49]

Following Caton's departure from the plant with his associates, and before he returned to the plant with the letter, Fiske and other management representatives decided to interview the sales personnel who were working on routes that day, other than the sales supervisors. Soon after the interview began, Walton Hardy, who was identified by Fiske as production manager, and who is listed on the payroll as plant superintendent, told Keyes to quit work for the day. Keyes, a driver-salesman who had suffered an injury which precluded his working as such and who was working as a checker, knew that the interviews were taking place and he was in a position to tell the incoming driver-salesmen of the fact that they would be interviewed. When telling Keyes to leave the plant, Hardy also told him that he would not lose any pay by leaving early. Keyes left and he suffered no loss in pay.[50]

The interviews began about mid-afternoon and continued until sometime that evening. According to Fiske, it was his intention to interview only the men who were scheduled to cover routes the next day and he gave instructions for "all the drivers" to be sent to Lang's
8876 office for interviews. Most of the men were sent by Sales Supervisor Keeler and a few were sent by other representatives of management. They were sent

[49] The findings concerning the delivery of the letter are based upon the testimony of Caton. The Respondent acknowledges that it received the letter, but it asserts that the door was not locked at the time given by Caton, that the door is not locked until 4:30 o'clock or later, that the letter was not found until approximately 8 o'clock, and that if the letter had been placed there at the time given by Caton it would have been found earlier. I discredit the Respondent's testimony. I see no sound reason for believing that Caton would place the letter under an unlocked door rather than deliver it in person, or that he would falsify concerning whether the door was locked. On the other hand, as appears below, at 4 o'clock the Respondent was in the process of questioning the driver-salesmen individually, and it is a reasonable inference that Fiske and other representatives of management chose to avoid possible interruptions by locking the public door earlier than usual.

[50] The findings concerning the conversation between Keyes and Hardy are based upon the testimony of Keyes. Hardy was not a witness.

one at a time, and each man was interviewed separately. Only a few men appear not to have been interviewed. Among those who were interviewed, 28 testified as witnesses for the General Counsel. Other witnesses were Keeler and several admitted supervisors, including Fiske. According to Fiske, before the first interview, he prepared a statement and question which he used at each interview. It reads:

> There may be a picket line around the plant tomorrow morning. My purpose in calling you in here is to ask you if when you report for work and if there is a picket line around the plant will you or will you not cross the picket line.
> I want this information so we will know how to set up routes for tomorrow.

Fiske testified also that at some of the interviews he spoke as follows:

> The officials of the Union came in the office this afternoon and presented us with an agreement to sign, which would recognize them as sole bargaining agents for you men.
> I advised the union officials that I was not an officer of the company but simply a paid employee the same as you are, and therefore was not authorized to sign any contracts. I advised them again to contact the general office in Richmond, Virginia.
> They advised me that if I did not sign the agreement this afternoon the men would go on strike to-morrow morning.

According to Fiske, the interviews consisted substantially of his comments and the question, as quoted, plus the answers of the men to the question in which a majority said that they would work, a "very small number" said that they would not work, and others expressed indecision. Fiske's testimony is supported in large measure by that of Wilbert Sales, Lang, and Hall. It is sharply disputed

by various witnesses for the General Counsel, however. Thus of the 28 employees who testified that they were asked whether they would cross the picket line, a number of them testified that Fiske's remarks were not confined to the above-quoted matter. For instance, there is testimony that Fiske belittled the threatened strike by speaking of a picket line which would be composed of a small number of the Respondent's employees and some professional pickets:[51] I find that Fiske did so.[52] In addition
8877 Mathias, who had not applied for membership in the Union, was asked by Fiske to give his opinion of the Union, and he answered that it had its place. Fiske told him that the Union had been defeated in the 1944 and 1948 elections and that the Respondent was capable of running its business without a union.[53] Moreover, Fiske asked Charles Bland, a driver-salesman, what he knew about the Union; Fiske asked Patton what he thought about the document which had been presented by the Union for Fiske's signature, to which Patton answered that he did not know "too much" about it; and Fiske asked Bennett and Bosworth if they knew anything about the prospective strike, to which they replied in the negative.[54] In addition to these inquiries, efforts were made to persuade some of the men to cross the picket line. Thus, when Bennett and

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[51] The following employees so testified: O'Malley, Strandberg, Watkins, Dan Kerlin, George Hawkins, William Esch, and William Elyard. In addition, Clements, Bennett and William Pardue testified that Fiske spoke of professional pickets, but they did not attribute to Fiske remarks concerning the number of employees who would strike, while Justin Mathias testified that he was told that there would be "a few people . . . from the plant" who would be on strike, and Thompson testified that Fiske said that he did not think that the strike "would amount to much." This testimony is contradicted by the Respondent's witnesses.

[52] I do not believe that truth is not to be found in the testimony of any employee named in the footnote next above. Some of those employees have been credited elsewhere herein. Moreover, I have discredited the testimony of Fiske and Sales in various instances. In particular, as set out below, I cannot credit the Respondent's professed reason for interviewing the employees nor its explanation for interviewing them separately.

[53] These findings are based upon the testimony of Mathias. The Respondent's testimony is to the contrary.

[54] These findings are based upon the testimony of Bland, Patton, Bennett and Bosworth. In each instance, the testimony is contradicted.

John San Fellipo, the latter a sales trainee, said that they were uncertain whether they would cross the line, Fiske and Sales told Bennett to think about it overnight, and Fiske told San Fellipo that he need not fear that there would be voilence. When Charles Bland and E. Pitsenbarger said that they would not cross the line, Fiske asked Bland if the Respondent had not treated him all right, and Sales asked Pitsenbarger "If we got you in here, would you take a truck out?", to which Pitsenbarger answered in the negative.[55]

In resolving the issues concerning the interviews, I have considered, among other things, the Respondent's testimony with respect to its purpose in conducting the interviews and its reasons for interviewing only one employee at a time. According to Fiske, his purpose was to determine how many of the employees would cross the picket line, rather than which employees would do so, in order to arrange to serve customers the next day. In explanation of the failure to hold a group meeting of all the employees to be interviewed, Fiske and Lang testified that such would have necessitated keeping all men at the plant until the last one came in from his route. According to Fiske, the individual interviews were "a convenience to the men more than anything else." The record is clear, however, that there were occasions when a number of men were waiting to be interviewed.[56] In explanation for his failure to interview at one time whatever number of employees were waiting, Fiske testified that the interviews were being conducted in the small private office of Lang

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[55] These findings are based upon the testimony of the named employees. In all respects, the testimony is contradicted. Other similar instances are not recited herein.

[56] Fiske testified that "sometimes there would be four or five [men] waiting," but that he did not think anyone waited "more than five minutes, if that long." Sales testified that there "were times when men were waiting." Thompson testified that there were "about six men ahead of" him and that it "must have been an hour" that he waited. Other employees who testified that they waited for shorter periods are Patton, Bennett, San Fellipo and Strandberg.

which would accommodate only a few people, and
8878 that "we just kept on there" rather than to go into a larger room, such as the private office of Fiske or the salesroom. In this connection, the Respondent's testimony is that the discussions which preceded the initial interview took place in Fiske's office, following which the interviewers went into Lang's small office.[57] The Respondent's explanations are unpersuasive. If the Respondent had been interested in "a convenience to the men," as Fiske testified, and if the Respondent's purpose had been solely to pose the question whether the men would cross the picket line, the men could have been asked that question in small groups as they completed their duties for the day. The fact that the men were interviewed individually, and that some men waited for longer periods of time than would be required for persons in line ahead of them to be asked a simple question and to give an affirmative or negative response, strongly indicates that Fiske had something more in mind. His real intent was to interrogate employees concerning their attitude toward the strike, to belittle the strike, and to seek to persuade employees to cross the picket line, as is established by the testimony of employees as above-described.

On January 27, the strike began. It was supported by a majority of the employees in the appropriate unit described below.

On February 4, following some correspondence between the Respondent and the Union, representatives of those parties met in Washington. The meeting was brief. While awaiting the arrival of Martin F. O'Donoghue, the Union's principal attorney, its associate counsel, Walsh, suggested that they proceed. Attorney Robert R. Merhige, Jr.,

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[57] There are conflicts in the evidence concerning whether all of the interviews took place in Lang's office, as the Respondent contends, or elsewhere as well, as some of the General Counsel's witnesses testified. There are also conflicts concerning whether persons in addition to Fiske, Lang, and Sales were at times present on behalf of management. I do not believe that these conflicts need be detailed and resolved.

spokesman for the Respondent, then said that the Respondent wanted an election. Robert Lester, a union representative, asked if Merhige was serious in view of the large number of striking employees. At about this point, O'Donoghue arrived, and Walsh informed him of what had been said. O'Donoghue asked if Merhige was serious, and Merhige replied that he had not "come all the way from Richmond to be facetious." Thereupon O'Donoghue used a vulgar expression and said that the Respondent was doing the same thing as it had done in 1944 and 1948 when it used O'Malley and other "stooges" to undermine the Union. O'Donoghue also said "Let's get out of here," and the Union's representatives departed.[58]

On February 6, the Union filed its charge which
8879 initiated this proceeding. On February 12, the Respondent mailed a letter, over the signature of Fiske, to a majority, if not to all, of the striking employees in which he said *inter alia* that it was the Respondent's

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[58] These findings are based primarily upon the testimony of Walsh who was a forthright and convincing witness. On the other hand, Fiske testified several times that O'Donoghue did not accuse the Respondent of seeking to undermine the Union. Lang gave like testimony, but he acknowledged that Lester said that there could be no question about the Union's majority status because of the number of strikers. Attorney Merhige testified that if O'Donoghue spoke of an effort to undermine the Union, the remark was not heard by him. It is apparent, however, from the testimony of Hobbs, the Respondent's general manager, that O'Donoghue did speak as found above. There is testimony that O'Donoghue, as well as Lester, spoke of the number of strikers, and Hobbs was asked by the Respondent's counsel whether O'Donoghue said:

> Want an election, surely you people can count, we have 44 men out on the street, the men this union is claiming as membership, so what more do you want to do? I know what you are up to, you are going to try to do the same thing that you did the last time.

Hobb's answer and further testimony is as follows:

> A. Yes, I think he [O'Donoghue] did.
> Q. He did what?
> A. Made such a statement, a statement to that effect.
> Q. What did he say?
> A. Substantially what you read.
> Q. What was the company's position with respect to that?
> A. We made no answer whatever, we had no position. We were insisting upon an election.

Hobbs was not asked if O'Donoghue also spoke of the use of "stooges" in order to undermine the Union. Hobbs was asked, however, "What was the union's position?" and he replied, "Well, the union's position was that they had a majority of employees."

policy not to violate the Act, that the strike was for recognition of the Union as the representative of the "salesmen," that the issue should be settled by an election, that the strike was a mistake, that the Respondent and the strikers were all suffering because of it, that the striking employees should return to work and request an election, and that the Respondent would bargain with "whomever you choose in accordance with the law." On the next day another letter over Fiske's signature was sent to striking employees and their wives in which Fiske again solicited the return of the strikers to work and advocated an election. He said, *inter alia,* that there was "a very valid question of whether or not a majority of you do want Union representation," that the Respondent had petitioned for an election, that it would abide by the result thereof, and that each employee was free to vote for or against the Union regardless of his union affiliation or activity. On February 18, the Respondent filed a petition in Case No. 5-RM-241. It was subsequently dismissed by the Acting Regional Director. At the time of the hearing only four employees had sought reinstatement. They received it.

F. Interference, restraint and coercion

8880 I find that by the following conduct the Respondent violated Section 8 (a) (1) of the Act: *First,* the inquiry by Robert Bland of Strandberg concerning what had taken place at the organizational meeting on January 14; *Second,* Harwell's inquiries of Thompson and Thomas Driver concerning the union activity, his comment to Driver that the men would lose more than they would gain by union representation, and his request of each of them that they inform him of anything they learned concerning the activity; *Third,* Elliott's inquiry of Watkins concerning the organizational meeting, his statement to Watkins that the men were foolish and that the Respondent could

do more for them than the Union, and his statement to Patton that the employees would lose their benefits if they designated the Union to represent them; *Fourth,* Witczak's inquiry of Hensley concerning the identity of employees who had initiated the union activity and his statement to Hensley that the Respondent had means of learning; *Fifth,* Keeler's inquiries of Thomas Driver concerning the union activity and the men's complaints, Keeler's statement to Driver that the plant might be closed, Keeler's inquiries of Bennett and Maynard concerning what the employees expected to gain by organizing, Keeler's statements to them concerning strikes at other coca-cola bottling plants and that the Respondent would close its Washington plant before it would recognize the Union, Keeler's inquiry of Clements concerning the union activity, and his statements to Clements concerning a strike in Pittsburgh and that the Respondent would close its plant; *Sixth,* Everhart's inquiry of Linthicum concerning the union activity, his request of Linthicum to inform him of anything that Linthicum heard, and his comment that union representation would be followed by the loss of benefits; *Seventh,* Fiske's inquiry of O'Malley if O'Malley had heard anything about the union activity; and *Eighth,* the inquiries by Wilbert Sales and Riviello of O'Malley on January 26 concerning the strike which was scheduled to begin on the next day, and Sales' solicitation of O'Malley to act to prevent the strike. The Respondent cites a number of cases in support of its contention that the questioning of employees was not violative of the Act. These cases have been considered and are found to be inapposite. The interrogations and statements here clearly tended to restrain, and to interfere with, the employees in the exercise of the rights guaranteed by the Act, and thus extended beyond the permissible bounds of interrogation which were set out in *Blue Flash Express, Inc.,* 109 NLRB 591. I find also that the Respondent, at the January 21 general sales meeting, changed its practice concerning culls and the time of such meetings

for the purpose of undermining the employees' union activity, and thereby also violated Section 8 (a) (1) of the Act. I find further that at the January 26 interviews, which were conducted by Fiske and other representatives of management, the Respondent inquired concerning the employee's union sympathies, belittled the forthcoming strike, and sought to persuade some employees to refrain from striking. Thes Respondent thereby also violated Section 8 (a) (1) of the Act. Cf. *New Hyden Coal Company,* 108 NLRB 1145.

G. The refusal to bargain collectively

1. The Appropriate Unit

The complaint alleges that "all drivers and driver-salesmen" at the Washington plant constiute an appropriate bargaining unit. The bill of particulars which the General Counsel later issued defines "all drivers and driver-salesmen" as the driver-salesmen, the full service drivers, the cup route drivers and the sales trainees. As appears herein, Caton's demands for recognition in January 1953 embraced a unit of driver-salesmen alone, the unit which had been agreed upon by the Union and the Respondent for the 1944 and 1948 elections. According to the General Counsel, either unit is appropriate, but he believes that the full service drivers, the cup route drivers, and the sales trainees should be included within a unit of driver-salesmen because their work is preparatory to becoming driver-salesmen. The Respondent does not disagree with the General Counsel that the former categories of employees should be included in the unit, but
8881 the Respondent does assert that the bounds of the unit should not end there. According to the Respondent's counsel, their examination of every decision of the Board in the bottling industry showed such a variety of units that counsel were unable to decide "what would be the final appropriate unit" in this case. Those counsel,

expressing "reluctance" to take a position as to the bounds of the appropriate unit because they could not foretell "what the Board's decision would be . . .," contend "that a minimum appropriate unit . . . would consist of all drivers and driver-salesmen and homogeneously related employees who have a clear community of interest with drivers and driver-salesmen at the Washington plant." They contend too that a unit of "drivers and driver-salesmen," as the quoted words were used in the complaint and in the document and letter which the Union presented to the Respondent on January 26, should be construed literally and that other employees who drive vehicles, as well as certain helpers and other plant employees, should be included.

The Respondent also would include within the unit employees at its Alexandria, Virginia, plant. It points out that the mimeographed form contract which Caton gave to Fiske on January 15, at Fiske's inquiry as above described, has the following introductory paragraph:

> AGREEMENT, by and between Beer and Soda Water Drivers' Local Union No. 67, to be known as the Union, and _____, a distributor of soda water in the Metropolitan Washington, D. C., and Alexandria, Virginia, area, to be known as the Employer.

According to the Respondent's counsel, the Union thereby "made the demand on us encompassing our Alexandria plant . . ." and they argue that "the most appropriate unit" would include some of the Alexandria plant's employees. The contention that the delivery of the form contract to Fiske constituted a demand for recognition of the Union as the representative of employees at the Alexandria plant is discussed below. At this point it suffices to say that evidence concerning the alleged relationship of employees at the Washington plant to employees at the Respondent's other plants was excluded upon the ground

that the issue is not what is the most appropriate unit, but, whether the unit set out in the General Counsel's pleadings is appropriate, which issue can be determined on the basis of the work of employees at the Washington plant without reference to an alleged relationship of those employees to employees at other plants.

In Section III, B and C, above, there is a partial discussion of the Washington plant and the work of certain employees. We have seen that there are four departments within the plant: sales, production, advertising, and service. As recited, a driver-salesman delivers bottled coca-cola to various types of establishments, including grocery stores, service stations, and clubs. Upon delivery, he collects the purchase price. If the customer owns or has leased a cooler, it is the customer's responsibility to keep it clean and supplied with coca-cola, but if the customer neglects this responsibility the driver-salesman may perform it. The driver-salesman endeavors to sell coolers to his customers and, when successful, receives a commission on the sale. He also endeavors to interest the customers in advertising, and in some instances he erects advertising inside their premises. He solicits new business, and his hours of work vary according to the time required to serve his customers. Upon returning to the plant, he unloads the cases of empty bottles, and loads the truck with cases and small cartons of full bottles. In this work he is assisted by a helper, if he used the services of a helper that day as described below; otherwise he is assisted by a laborer from the production department. Thereafter, he settles his financial account for the day and, if he has difficulty therein or finds that he has insufficient money for the quantity of coca-cola sold, he takes up the matter with a sales supervisor.

A full service driver serves only coolers which are owned by the Respondent. He opens the machine, fills it, observes whether it is in sanitary condition and working

order, cleans it if need be, collects the empty bottles, removes the money from the cash box and determines if it reflects correctly the number of bottles which have
8882 been sold since his last visit, locks the machine, makes a record of pertinent matters, and proceeds to the next stop on his route. The length of his workday varies and some full service drivers are required to do weekend work as recited in Section III, C, above.

A cup route driver serves only machines which dispense coca-cola in paper cups. Upon opening a machine, he replenishes the supply of coca-cola syrup, carbon dioxide, and cups. He also cleans the machine, collects the money and compares it with the quantity of drinks which has been dispensed by the machine, locks the machine, prepares his written record, and proceeds to his next stop. As in the instance of driver-salesmen, both the cup route and full service drivers prepare financial statements after returning to the plant each day. *They are in training to become driver-salesmen.*

The sales trainees are in training to become cup route or full service drivers.

The production department, which is headed by Plant Production Manager Hardy, utilizes a large percentage of the employees, and is engaged primarily in the various aspects of bottling coca-cola.

The advertising department, of which Hall is manager, has three other employees. One is a sign painter and erector, another is a sign erector, and the third is a valance man. Many of the Respondent's advertisements are obtained as "stock signs" and require little or no preparation before installation. Other signs must fit the requirements of the individual customer, such as a score board at a ball park, and may include the customer's name. Requests for advertising are generally initiated by driver-salesmen after discussing the matter with their customers, and the requests are channeled to Hall. The

employees in the advertising department take care of the preparation and erection of the advertising. In the performance of their duties they drive trucks, and at times when convenient they meet the appropriate driver-salesman on his route at the customer's establishment when the sign is to be erected. According to Fiske, the qualities to be expected of an advertising employee are a high school education, as is usually required of all employees other than those in the production department, plus imagination, an ability to erect signs, or a knowledge of advertising.[59]

The service department, which is also known as the cooler service department, maintains coolers in good refrigerating condition. The department head is Maurice Wright, and there are about 10 employees therein. Fiske testified that the work is specialized, with "certain phases of it [being] highly specialized," and requires a knowledge of such matters as refrigeration or selective coil mechanisms. Employees in this department perform their work at the location of a cooler in a customer's establishment if repairs can be made there; otherwise the cooler is brought to the plant by other employees as described below. The service department employees repair coolers which are owned by the Respondent, as well as coolers which are owned or leased by customers. According to Fiske, they perform all repairs including painting, except such minor "repairs" as observing whether the electric cord has become worn, or its plug has become disconnected from a wall socket outlet, which may be taken care of by the sales employee who serves the machine. In going to a customer's establishment, they drive trucks into which have been loaded materials that may be needed for the repair work. After repairing the cooler, if a serviceman sees that it is emtpy and that a supply of coca-cola is on

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[59] According to Fiske, employees "with good personality" in the advertising department may assist in the sale of coca-cola upon special occasions such as conventions or a Soap Box Derby, but the record is clear that these employees do not customarily engage in the sale of the product.

hand at the customer's establishment, he will fill the cooler. In this respect, he performs a function which is ordinarily that of the sales employee who serves the machine.

8883 In addition to the work of the four plant departments as described, there are certain aspects of the plant's operations which need be discussed. One is the transportation of coolers. The record contains references to a "cooler delivery department," but this is a misnomer. The function of cooler delivery employees is to transport coolers by delivering them to retail outlets or by bringing them to the plant, in some instances to be repaired by employees in the service department. The principal employee who performs this work is Luther Heard, who is one of a number of employees in the production department with the classification of "plant labor." [60] He is aided by Andrew Booe or another employee in the production department. Fiske testified that Assistant Sales Manager "Riviello and Mr. Sales' assistants are in charge of cooler delivery and cooler sales," and that when Heard transports coolers he is under the supervision of Riviello. In transporting coolers, Heard and Booe drive trucks, and upon occasions when it is not convenient for the sales employee, on whose route the cooler is to be installed, to be present and to fill the cooler with coca-cola, Heard and the helper will fill it.

Another aspect of the plant's operations is the sale of coca-cola at what are called "special events," such as sports events, conventions, and parties. The term "special events department" appears in the transcript, but again this is a misnomer. This type of work is under the direction of Vernon Custer who is listed on the payroll as "Special Salesman" and whose title, according to Fiske, is "Special Events Supervisor." Custer ascertains the requirements for the sale of coca-cola at special events by talking with

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[60] Fiske testified that Heard spent practically all of his working time in transporting coolers and that his classification had been changed on payrolls subsequent to that of January 21, 1953, which was received in evidence.

persons connected therewith. Thereafter, Luther Armstrong,[61] sometimes with the help of an employee in the advertising department, will deliver coolers, bars, advertisements, etc., to the special event grounds and place them in proper position. Normally, the driver-salesman along whose route the special event is being held will deliver the coca-cola and fill the coolers, but this work may be done by Armstrong if the driver-salesman is unable to do so because of other work or because the special event takes place on a Saturday or another nonworking day.[62]

We turn next to several categories of employees. In addition to Heard and Armstrong, there are employees in the production department who, according to Fiske, spend a portion of their working time in driving trucks, such as in connection with the delivery of coolers and the transportation of freight. There are also several mechanics who maintain the plant's automobiles and various types of trucks in operating condition, and who have occasion to drive vehicles in such work. There are also employees who are checkers, and references were made in Section III, E, to a checker named Burgess. The several checkers check the contents of a truck when a sales employee returns to the plant from his route, making note of the quantity of empty bottles which are removed from the truck and the quantity of full bottles which are placed upon it. Their work thus brings them into contact with the sales employees.

Next we consider the helpers to the driver-sales-
8884 men. Their work is to assist in delivery of bottled coca-cola. The number of the helpers varies, depending upon the number of driver-salesmen who wish their

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[61] Armstrong is listed on the payroll as "Advt. Spec. Events" immediately following the listing of persons in the advertising department.

[62] Fiske testified that Armstrong is compensated at an hourly rate and that he does not receive a commission on coca-cola which he delivers to a special event. Fiske testified also that the commission, based upon the quantity of coca-cola sold, is "divided up among the men who worked there, whether a salesman, supervisor, or one of the men from advertising, or whoever he was, . . . because that was not regular duties."

services.[63] The payroll for January 21, 1953, lists nine helpers. As is shown by the route numbers entered upon that payroll immediately following the names of the helpers, coupled with the testimony of Fiske, a helper may work for more than one driver-salesman during a work-week. All helpers must be approved by the Respondent, but each helper is hired by the driver-salesman who desires his services, and the employment may be terminated by the driver-salesman at any time. Upon such termination, a helper may find work with another driver-salesman. His compensation is at an hourly rate. In order for him to receive it, the driver-salesman makes out a time slip showing the number of hours worked, following which the helper's wages are deducted from the commission earnings of the driver-salesman, and the helper is given his pay by the Respondent. The helpers, although they are employees of the Respondent, do not receive the benefits of the Respondent's bonus and vacation plans. As Fiske testified, they "take vacations frequently," without pay, when averse to working. Their names appear in handwriting on a separate sheet of the plant's payroll, devoted exclusively to them, as distinguished from the typewriting in which most names appear on consecutive sheets. It is reasonable to infer that such listing on the payroll results from their irregular hours of work, whether due to limited work opportunities or to a disinclination to work. Fiske testified that the helpers constitute a "pool," a very few of whom appear at the plant regularly for work, and that persons in the pool frequently "do not show up at all, [and] then they come around and work a few days." Fiske testified further that the Respondent discourages the use of helpers at all times and insists that a helper not be used "if a man [driver-salesman] doesn't warrant a helper." Fiske also testified, however, that the Respondent has sought to utilize the training which a helper receives in order to develop the helper into becoming a driver-salesman, but Fiske

[63] As recited in footnote 1, the sales supervisors sometimes use helpers.

acknowledged that these instances were not "many." One such instance was that of a man named Barthelow who became a driver-salesman after working as a helper for his brother, George Barthelow. This is an exception, however, because, as Fiske testified, a number of the helpers have no expectation of becoming driver-salesmen.

According to the Respondent, the appropriate unit should contain all driver-salesmen; all helpers to driver-salesmen; all full service and cup route drivers; all sales trainees; all sales supervisors; all checkers; all employees in the following departments or divisions who drive trucks: advertising, service, production, special events, and cooler delivery; all helpers to cooler drivers; all freight drivers; and the garage mechanics. This position is sharply at variance with the Respondent's agreement with the Union in the elections of 1944 and 1948 that the bargaining unit should consist of driver-salesmen alone, and it brings us to another contention of the Respondent, namely, that its agreement to a unit of driver-salesmen in those years has no probative value in determining the issue here. This contention is based, in part, upon the ground that the Respondent was not represented by legal counsel in the 1944 and 1948 representation matters, but "by a layman [General Manager Hobbs] who had no technical knowledge whatsoever of what units were appropriate . . . ." I reject this proposition. The Board has long encouraged management and labor to resolve their unit differences, and I do not believe that legal advice was essential to the Respondent on this subject in those years. Another ground for the contention is that there has been a reorganization of the Washington plant since about 1950. In this connection, Fiske, who was assistant plant manager in 1944 and 1948, and who became plant manager in or about 1950, testified that he "slightly" reorganized the plant so as to "have the sales department, especially, and all the departments which might have been considered related to the sales department

better coordinated and better integrated so we could
8885 have a greater degree of efficiency." On the other hand, Sales Supervisor Everhart, also a witness for the Respondent, testified that he has been an employee of the Respondent in various capacities since 1946 and that the functions of employees in the advertising and service departments, in which he worked before 1948, were the same then as in 1953; that the duties of a sales supervisor have remained the same; that the relationships between the sales supervisors and the men in their divisions has remained the same; and that the relationship between the driver-salesmen and the employees in the service department also has remained the same. Everhart pointed out that there have been new types of advertising and a growth in the size of the service department, and it is a reasonable inference from facts recited in the stipulations concerning the 1944 and 1948 elections that the number of sales employees has increased since 1944.[64] I do not believe that Fiske's elevation to the position of plant manager, and the alleged reorganization of the Washington plant since about 1950, constitute a reason for disregarding the stipulated units in 1944 and 1948. There does not appear to have been a substantial reorganization. Moreover, the employer is the same, as is the person in charge of labor relations, Hobbs, the general manager of all of the Respondent's operations. Thus, while one Dan Holland and one Frank Noel signed the consent-election agreements as plant manager in 1944 and 1948, respectively, Hobbs testified that it was he who really handled election matters on behalf of the Respondent in those years. I conclude that the Respondent's agreement upon an appropriate unit in 1944 and 1948 is not to be disregarded here.

The Board has held that driver-salesmen constitute an appropriate unit in the soft drink bottling industry, *Rock-*

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[64] The Respondent employed both full service and cup route drivers in 1948. There were no cup route drivers in 1944, but there may have been full service drivers in that year.

ford Coca-Cola Bottling Co., 81 NLRB 579, and that such unit may embrace the trainees for such work, *Seven-Up Bottling Company of Miami, Inc.*, 92 NLRB 1622, or the driver-salemen's helpers where each such salesman is normally assisted by a helper, *Atlanta Coca-Cola Bottling Company*, 83 NLRB 187. The Board has held also that, under certain circumstances, driver-salesmen may be included within a unit of production and maintenance employees, as was said in the *Rockford* case, *supra*, and that the Board will sometimes utilize the procedure of self-determination elections whereby the employees themselves decide the question whether to have a limited or larger unit, *Terre Haute Coca-Cola Bottling Co., Inc.*, 100 NLRB 435. Our problem is an unusual one, however. We are not confronted with an issue of whether the driver-salesmen, full service drivers, cup route drivers, and sales trainees belong in a plant wide unit, or a unit of production employees, or a unit of production and maintenance employees, since no party here advocates the inclusion in the unit of all plant, production, or production and maintenance employees. Instead, our problem is whether the driver-salesmen, full service drivers, cup route drivers, and sales trainees constitute an approriate unit, or whether the unit should embrace also: (1) other employees who drive vehicles in the performance of their work, and who sometimes perform a function which is normally performed by a sales employee, regardless of both the proportion of their working time which is so spent and the principal nature of their work; and (2) certain other employees who do not drive vehicles, but who, along with some of those who do drive, come in contact with sales employees as the latter perform their duties.

The above findings make clear, and Fiske testified, that the sales operations of the Washington plant are "highly specialized." Nevertheless, there have been instances in which driver-salesmen were transferred to work in other departments, sometimes because of having sustained in-

juries which prevented continued work as driver-salesmen, and instances in which some employees became driver-salesmen after first working in other departments. Fiske testified, however, that it is not the practice to have advertising department employees handle the routes of the driver-salesmen, full service drivers and cup route drivers; that normally those salesmen are not shifted to work in the advertising department; and that production 8886 department and special events employees do not normally interchange with those salesmen. Moreover, the sales personnel are normally hired with the specific intent of being trained for sales work, and it cannot be said that employees in departments other than the sales department belong in a bargaining unit with sales employees because of any expectation of receiving advancement to sales jobs.

I do not believe that an appropriate unit consists of sales employees plus a cross-section of other employees when the other employees would be embraced in the unit, not on the basis of the department in which they work or their principal duties, but instead on the basis of whether they drive vehicles, or sometimes perform a function which is normally performed by a sales employee, or come into contact with sales employees as the latter perform their duties. As the Board said in the *Rockford* case, "We find no reason to include these employees [refrigeration maintenance men, a garage mechanic and a trailer truck driver] in a unit of route salesmen from which other plant employees are excluded." Moreover, the driver-salesmen, full service drivers, cup route drivers, and sales trainees are under different supervision; they have different hours of work; they are compensated on the basis of commissions except (1) the few cup route drivers and sales trainees who work at hourly rates until they receive conventional or full service routes, and (2) upon the occasions when the weekly sales of a driver-salesman or a full service driver may be so low as to require payment on a guarantee basis; they

have duties which differ from those of other employees; and their collective bargaining problems are sufficiently distinct from those of other employees to warrant a separate unit, as the Respondent recognized, at least as to the driver-salesmen, by agreeing to the bargaining units in the 1944 and 1948 elections. Finally, I would exclude (1) the sales supervisors for the reason that they are supervisors within the meaning of the Act, and (2) the helpers to driver-salesmen for the reason that they are irregular and casual employees who report for work at times suitable to them, but who work only at times suitable to the driver-salesmen, and who have little or no expectation of becoming driver-salesmen.

I find that the driver-salesmen, the full service drivers, the cup route drivers, and the sales trainees at the Respondent's Washington plant constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

2. The Union's majority status

As recited, on January 14, 1953, a number of the driver-salesmen met at Bortnick's restaurant and signed applications for membership in the Union. I deem it unnecessary to decide whether the number constituted a majority of the driver-salesmen because the appropriate unit embraces other employees also, and the record is clear that those applications are insufficient in number to constitute a majority of the employees who were in the appropriate unit on that day. During the next 13 days, additional employees with the unit signed applications for membership. During those days there also were changes in the number of employees in the unit by reason of hires and terminations of employment. To determine the exact date upon which the Union achieved majority status would require a lengthy recitation of evidence. It suffices to say that a majority of the employees in the appropriate unit testified convincingly that on or before January 27, the day

the strike commenced, they had designated the Union to represent them, and that on that day the Union possessed applications for membership, in some instances accompanied by the payment of a $10 initiation fee, from a majority of the employees in the unit. My finding that the Union possessed majority status is based, however, primarily upon the strike activity of the employees, as recited below.

On January 27, there were 58 employees in the 8887 unit.[65] An issue exists concerning whether one other employee should be included therein, but this issue need not be decided for reasons set out in the footnote.[66] Of those 58 employees, 33 testified that they par-

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[65] This finding is based upon the number of employees in the unit on January 21, as shown on the payroll which was received in evidence, coupled with testimony concerning the identity of employees who were hired, or whose employment was terminated, between that date and January 27. Those 58 employees are listed below, and as to such of them as were employees on both January 21 and 27 the listing follows the order in which they are named on the payroll: Clarence Self, Hensley, Robinson, Kiper, Clements, Hollowell, Claude Self, Willard, George Hawkins, Pardue, Magee, Way, Charles Bland, Morrison, Weaver, Urich, Bennett, Watkins, Wolfe, Strandberg, O'Malley, Snellings, Thompson, Cooper, Harris, Posey, Morrissette, Linthicum, Kerlin, Bosworth, Stewart, Kurtz, Elyard, Maynard, E. Pitsenbarger, Barthelow, Patton, Smith, Crider, Driver, Lukens, Brinkman, Irving, N. Pitsenbarger, Mathias, Van Fossen, Cross, Warner, Masarick, Rousseau, Esch, Glenn Hawkins, Kline, Harper, McGowan, San Fellipo, Granahan, and Neill. The last two named employees are not named on the January 21 payroll. With respect to one employee named above, Irving, there is considerable doubt that he should be included in the unit because he began a 2-week vacation on January 19, accepted employment with another employer on January 26, and did not return to work for the Respondent. It is unnecessary to recite the evidence and decide whether Irving, in effect, resigned his employment with the Respondent on January 26. His inclusion in the unit has no material effect upon the Union's majority status.

[66] In the discussion of the individual interviews of employees on January 26, it was found that Keyes worked as a checker that day and was told to leave the plant. The issue is whether Keyes should be included within the unit. Some months before 1953, Keyes, a driver-salesman, sustained a hand injury which prevented his working in that capacity and thereafter he worked as a checker. He remained on the payroll as a driver-salesman, however, receiving the commissions from his route although someone else worked it. His name appears on the January 21 payroll in type as a driver-salesman, but that entry was deleted and a substitution made in handwriting with Keyes' name being added near the end of the payroll as a checker. There is conflicting evidence concerning when and why Keyes' classification was changed. It is unnecessary to resolve the conflict. Keyes became a member of the Union and participated in the strike, but if he be included in the unit the number of employees therein increases by one only, and his designation of the Union to represent him is not determinative of the Union's majority status.

ticipated in the strike by voluntarily withholding their labor [67] and by picketing at various times over a period of months.[68] There is also reliable testimony by some of those 33 employees that 7 additional employees engaged 8888 in strike activity.[69] The employees who testified concerning their strike activity constitute a majority of the employees in the appropriate unit, and when we add to their number the employees who were not witnesses, but who, according to the testimony, were also strikers and pickets, the Union's majority becomes substantial.

We do not have here a question whether one's mere withholding of labor during a strike, whether voluntary or involuntary, constitutes a designation of a labor organization as one's bargaining representative. Our situation is one in which a majority of the employees, by their own testimony, voluntarily withheld their labor and engaged in picketing, seeking thereby to achieve recognition of their Union as their representative. This is imposing evidence of union designation, and it is well established in Board and Court law that voluntary participation in strike activity by employees constitutes a designation of a labor organization as their representative. *Seven-Up Bottling Company of Miami, Inc., supra,* and cases cited therein; enf'd *N. L. R. B.* v. *Seven-Up Bottling Company of Miami, Inc.,* 196 F. 2d 424 (C. A. 5).

I find that on January 27, 1953, the date the strike began and at all times thereafter, the Union was the duly desig-

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[67] Those 33 employees are: Bennett, Charles Bland, Bosworth, Brinkman, Clements, Cross, Driver, Elyard, Esch, Harris, George Hawkins, Hensley, Kerlin, Kurtz, Linthicum, Mathias, Maynard, Morrissette, O'Malley, Pardue, Patton, E. Pitsenbarger, San Fellipo, Snellings, Stewart, Strandberg, Thompson, Van Fossen, Watkins, Way, Weaver, Willard and Wolfe.

[68] As recited above, only four strikers sought reinstatement and all were reinstated. Those four are Brinkman, Hensley and Morrissette, who, according to their testimony, remained on strike for a period of months, and Crider, who was not a witness and who spent an uncertain time on strike.

[69] These seven employees are: Crider, Harper, Hollowell, McGowan, Masarick, Rousseau and Smith. One other employee, Warner, remained on strike for about one-half hour only, and I do not count him in my computation of the Union's majority status.

nated representative of a majority of the employees in the appropriate unit and, pursuant to Section 9 (a) of the Act, was the exclusive representative of all employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

3. The refusal to bargain

There is no dispute that the Respondent rejected the Union's demands for recognition and insisted upon an election conducted by the Board. In defense, the Respondent advances several propositions, one of which, that the unit advocated by the General Counsel is inappropriate, has been considered above.

The Respondent's counsel assert that the Union did not clearly define the unit which it had in mind and that at all times material the Respondent was unaware of the Union's position respecting the unit. The record does not support this assertion. On January 15, when Business Agent Caton called upon Plant Manager Fiske, Caton claimed to represent "the men." On its face, the claim is certainly ambiguous with respect to a unit. It must be borne in mind, however, that there had been two elections at the plant, that in each instance the unit was composed solely of driver-salesmen, and that Caton and Fiske had been, respectively, the Union's representative and the assistant plant manager on both occasions. Caton's use of the quoted words was a reference to the driver-salesmen, as subsequent events establish. As we shall see, General Manager Hobbs was not in doubt about the Union's desires concerning the unit, but Fiske testified at length concerning his own professed doubt. We shall consider Fiske's testimony. As recited above, during the course of the January 15 meeting, Fiske inquired of Caton concerning the Union's contractual desires, and Caton gave to Fiske a mimeographed form contract which contained a blank space for the insertion of an employer's name, followed by the words: "a distributor

of soda water in the Metropolitan Washington, D. C., and Alexandria, Virginia, area, to be known as the Employer." That document refers to the Union as the representative of the "soda water drivers and driver-salesmen." According to Fiske, he was confused by Caton's use of the words "the men" and his confusion increased when, after Caton had departed, he read the form contract and was surprised at the Union's "demand for both Washington and Alexandria" plants. Fiske acknowledged that Caton did not speak of the Alexandria plant at any meeting between them and that he did not inform Caton of his alleged confusion. Under these circumstances, coupled with the fact that

8889 Caton did not present the form contract to Fiske as a part of his demand for recognition, but instead produced it only after Fiske's inquiry concerning contractual terms, I cannot credit Fiske's testimony that he was confused by its reference to Alexandria, Virginia.

Fiske testified further that his confusion increased as later events transpired. We have seen that on January 26 Caton demanded that Fiske sign a document by which the Respondent would recognize the Union as the representative of "the drivers and driver-salesmen." Although the document identifies the Respondent as being located at the address of its Washington plant, and makes no reference to the Alexandria plant, this factor appears not to have dispelled Fiske's professed confusion concerning whether the Union sought to represent employees at the latter plant. On the other hand, according to Fiske, the use of the word "drivers" indicated to him "all drivers," that is, all employees who drive the Respondent's various types of vehicles in the course of their work. Again, however, Fiske did not voice his professed confusion to Caton. Later on that day, as recited, Caton placed under a door to the plant a letter in which the Union claimed to have been designated by "39 out of 46" of the "drivers and driver-salesmen." Again, according to Fiske, this served only to increase his confusion. Try as he might, he "ab-

solutely could not" determine what unit the Union had in mind. An examination of the payroll in evidence, coupled with the stipulated unit in the 1944 and 1948 consent elections, leaves little room for confusion, however. The payroll does not list any employee as a "driver" or a "driver-salesman." It lists the driver-salesmen as "salesmen," and it contains spaces for the entry of the names of 48 driver-salesmen and the daily business on each of 48 routes. Two of those spaces contain no names or other entries, and Fiske testified that the routes had become nonexistent by having been absorbed into other routes after the peak business season. Thus, simple arithmetic leaves 46 routes, the number set out in the Union's letter, but Fiske testified that he thought that two routes shown on the payroll, which contain entries concerning the week's business although no entries of driver-salesmen's names, were in the process of absorption by other routes and were worked by a sales supervisor and a sales trainee. One route was worked throughout the week, and the other route for 2 days.

Additional testimony by Fiske concerning his professed bewilderment involves employees on the picket line after the strike began on January 27. According to Fiske, he observed on the picket line three employees who were not in the categories which constitute the appropriate unit, namely, Keyes, Ralph Batch and one Perry. While the presence of Perry, a helper to driver-salesmen, may have been slight cause for Fiske to wonder, the same may not be said concerning the presence of Keyes and Batch. Keyes is referred to in footnote 66 and elsewhere herein as an employee who was sent from the plant soon after the interviews began on January 26. Batch is listed on the payroll as "plant labor," but he worked a cup route on January 26, as he had done before in emergencies, and he is one of the employees whom Fiske interviewed on that day.

There is also testimony by Assistant Plant Manager Lang concerning his professed confusion on the subject of the Union's unit wishes. All of the testimony concerning the professed confusion of Fiske and Lang was received because of the Respondent's assertion that its professed uncertainty concerning the appropriate unit had been a factor in its insistence upon a representation proceeding before recognizing the Union. When the evidence is studied, however, it reflects primarily upon Fiske's credibility. Fiske testified that his reason for not asking Caton to dispel the confusion by clarifying the Union's position on the unit was that he had no authority in the matter, that the matter "was something for other people [General Manager Hobbs] to discuss." The Respondent thus takes an untenable position. If Fiske was not authorized to enter into a discussion with Caton concerning the confines of the unit, it avails the Respondent nothing that the Union allegedly failed to make its unit demand clear to Fiske. The same is true as to Lang since he is Fiske's subordinate. If, as the Respondent asserts, Hobbs was

> the only management representative who was em-
> 8890 powered to act upon the Union's demand for
> recognition, the question is whether Hobbs was

confused as to the unit which the Union desired. As we shall see, Hobbs was not confused, but before discussing that point we shall examine the evidence which disproves Fiske's professed bewilderment. We shall do so because Fiske was a major witness for the Respondent and his credibility is important in the resolution of various issues herein. As recited, after Caton's departure from the plant on January 26, Fiske decided to interview the employees who worked routes in the sale of coca-cola. Fiske testified twice that he gave instructions that "all the drivers" be sent in for interviews. Thus, while Fiske asserts that he was confused by Caton's use of the word "drivers," it is clear that Fiske used the quoted word to mean employees who worked routes in the sale of coca-

cola. Next, as recited above, Fiske testified that at some of the interviews he said to employees that

> The officials of the Union came in the office this afternoon and presented us with an agreement to sign, which would recognize them as sole bargaining agents for *you men.* [Emphasis supplied.]

Bearing in mind the categories of employees to which the interviews were restricted, it is apparent that Fiske was at most slightly confused on the subject of the unit.[70] Finally, as we have seen, on February 12, after the strike had been in progress for about 2 weeks, the Respondent mailed a letter over the signature of Fiske to striking employees. Recalling that the driver-salesmen are listed on the payroll as "salesmen," we note that in that letter it was said that the strike

> is a strike for recognition, that is, an effort to have the company recognize Local 67 as the sole bargaining representative, not only for you but also for those *salesmen* still on the job. [Emphasis supplied.]

Obviously, Fiske was not then confused by Caton's use of the word "drivers." Moreover, the strike was in progress for some weeks before the issue of the unit was raised by the Respondent, and it is a reasonable inference that its raising is an afterthought.[71]

We turn now to the testimony of Hobbs, the Respondent's general manager and the superior of Plant Manager Fiske, and here we see that Hobbs' insistence upon an

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[70] As found herein, Caton's demand was for a unit of driver-salesmen. The Union's organizational efforts were confined substantially to driver-salesmen until the day the strike began. Of the other employees in the appropriate unit, a few signed applications for membership before that day. There was no effort by the Union to organize these employees until January 27, however, and the effort sprang from a fear that if they remained unorganized they might handle the routes of the striking driver-salesmen.

[71] In continued discussion of Fiske's professed confusion, he testified that an election conducted by the Board "would clear up the atmosphere and let us [the Respondent] know what they [the Union] were asking for. Certainly in order to have an election, we thought they should have to spell out the unit, who was eligible to vote." An easier method of determining the Union's position would have been to ask the Union to express itself more clearly, but, according to Fiske, he did not do so because he had no authority in the matter.

election was not based in any part upon an uncertainty concerning Caton's unit claim or upon a desire for a representation proceeding in which the Board would determine the unit. As recited above, Hobbs received a telephone call from Fiske following Fiske's meeting with Caton on January 15, and Hobbs' testimony is that he told Fiske that "we had been through all that before, and we would insist upon having an election." The comment that the Respondent "had been through all that before" was a reference to the 1944 and 1948 consent elections and is indicative that Hobbs had in mind a unit of driver-salesmen. Moreover, as a witness, he was asked to state why he insisted upon an election in 1953. He answered that the reason was a reasonable doubt that the Union had a majority status, based upon the outcomes of the past elections. He was asked if there were additional reasons, and he answered, "No, I think that is the only reason." The record is clear, and I find, that the Respondents' insistence upon an election was not based upon a doubt as to either the confines of an appropriate unit or the unit for which Caton made demands.[72]

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Another defense raised by the Respondent is that the Union did not make an express demand for recognition as the representative of the employees in the unit which has been found to be appropriate. As we have seen, Caton's demands were for recognition of the Union as the representative of the driver-salesmen alone. I do not believe, however, that this circumstance constitutes a fatal defect

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[72] The Respondent advanced another defense in connection with its insistence upon an election, namely, that the doctrine of the *B. F. Goodrich Company* case, 106 NLRB 757, is applicable because of an alleged policy of the Respondent to insist upon elections when confronted with demands by labor organizations. Hobbs' testimony was not helpful. He was asked if the Respondent had a policy with respect to requiring Board elections before recognizing labor organizations, and he answered, "I don't think it would be a question of policy. I think the policy is more or less defined by what actually took place in 1944 and 1948." He testified also that there had been no union demands for recognition at any of the Respondent's other plants. In the *Goodrich* case the employer had nation-wide operations which required it to deal with various unions, and the employer steadily refused to agree to consent elections, neither of which circumstance is true of the Respondent.

in the General Counsel's proof. We do not have here a situation as in *Mike Persia Chevrolet Co., Inc.*, 107 NLRB 377, where the Board found that the labor organization at different times advocated appropriate and inappropriate units of substantial dissimilarity by reason of the number of *employers,* and that that organization "never properly made a bargaining demand for the single-employer unit" which the Board found to be appropriate. Here, on the other hand, the Union's demand embraced a unit, the driver-salesmen only, which it and the Respondent had agreed in earlier years was appropriate. The General Counsel asserts that such unit was appropriate in 1953, but he argues that the inclusion of the full service drivers, the cup route drivers and the sales trainees with the driver-salesmen also constitutes an appropriate unit. For reasons set forth above, I have concluded that the unit should include the former categories of employees. Those categories are really fringe groups, and their inclusion in the unit does not constitute a substantial variance from the unit for which demand was made. I do not believe that a labor organization, in making a demand that an employer recognize it, is required to be possessed of such clairvoyant powers as to set forth every category of fringe group which the members of the Board at some future date after a detailed hearing would include within the unit. As we have seen, the Respondent's counsel spoke several times of their own inability to forecast the Board's determination of the unit. See *Barlow-Maney Laboratories, Inc.*, 65 NLRB 928, at page 944, where the Board said: "By this we do not mean that this Board, in reviewing the record in a complaint case, may not sustain an allegation based on Section 8 [a] (5) and yet make minor variations in the unit originally proposed by the charging labor organization."

We turn to another defense, namely, that the Respondent was entitled to an election because of a good faith doubt that the Union possessed majority status. I must reject this defense also. "A certification is not an indispensable condi-

tion precedent to an employer's obligation to bargain." *Safeway Stores, Inc.*, 110 NLRB 1718. The Board's
8892 election machinery exists for the purpose of ascertaining the desires of employees concerning union representation, and an employer may not lawfully insist upon the utilization of that machinery if he "is motivated not by a good faith doubt, but by a 'desire to gain time and to take action to dissipate the union's majority,' " *Safeway Stores, supra.* I do not believe that the Respondent's refusal to recognize the Union was based upon a good faith doubt as to its majority status. The record establishes that after the Union's initial demand, Plant Manager Fiske and certain of his subordinates among the supervisory personnel engaged in unfair labor practices which embraced interrogation, threats, an effort to adjust employees' grievances by changing the policies concerning culls and the time of general sales meetings, and an effort to diminish the effect of the forthcoming strike by belittling it and by seeking to persuade employees to refrain from striking. Thereafter, by letter of February 13 to striking employees the Respondent urged their return to work and told them that they would gain "nothing" by being represented by the Union. The letter also recited that the "fact that you have signed authorization cards or may even be union members, or have engaged in . . . [the strike] does not mean a thing when it comes to voting. When you vote, you are entirely free to vote as you please, to vote for or against the Union. . . ." As found in Section III, I, below, this letter to striking employees constituted another unfair labor practice. Manifestly, the Respondent's conduct paints a picture of an employer which was seeking to undermine a labor organization and which hoped that its striking employees would use an election as a means of repudiating their chosen representative. The Respondent had no reasonable doubt about the desires of the employees. The finding of majority status herein is based primarily upon the number of employees who participated in the strike. The Board itself found in

Brewery and Beverage Drivers and Workers, Local No. 67, 107 NLRB 299, the companion case to this one in which the Union's unlawful picketing was litigated, that "About 44 of the Company's approximately 54 drivers-salesmen stopped work and began picketing the plant. . . ." Everhart, a sales supervisor, testified that it appeared to him on the morning the strike began that "the entire [sales] crew was out in front of the plant," and Esmond Miller, another sales supervisor, testified that Wilbert Sales expressed surprise at the number of men who were outside the plant. Moreover, the Respondent knew which employees were on the picket line. As the strike continued, there were various conversations between men on the line and representatives of management, as is mentioned in Section III, I, below. These conversations made the Respondent all the more aware of the identity of pickets. Too, Fiske was asked to give his recollection in detail concerning which employees were on the picket line, and he recalled a sizeable number. He testified also that he assumed that all employees who were standing outside the plant or walking in the line were pickets. Whatever doubt the Respondent may have had concerning the Union's majority status before the strike began, there was no basis for it thereafter. Moreover, as we have seen, at the conference on February 4, when Attorney O'Donoghue accused the Respondent of bad faith and of seeking to undermine the Union, his accusation was met with silence. According to General Manager Hobbs, as set out in footnote 58, "We made no answer whatever, we had no position [with respect to O'Donoghue's accusation]. We were insisting upon an election."

In asserting that the sizeable participation of employees in the strike did not remove its professed doubt, the Respondent argues that employees were motivated by fear in not crossing the picket line where there was "illegal" picketing. This assertion is without merit. It is founded in the testimony of Fiske. According to him, he received hearsay reports that "several" employees had expressed a

fear to cross the line, but he could identify only one such employee, David Harper, a sales trainee who was employed shortly before the strike began. Fiske also qualified his testimony when he was asked on cross-examination:

> Q. Now, you were stating that certain employees were in fear of crossing the picket line. Who, for example, was in fear that you knew of?
>
> A. I don't know whether I said anybody was in fear
> 8893 of it. I said they didn't cross it, and they told us they didn't cross it because they were stopped by pickets.

As recited in footnote 70, when the strike began the Union sought to recruit new members among the full service drivers, the cup route drivers and the sales trainees. Harper was a sales trainee, and there is no question that he was "stopped by the pickets" when they solicited and received his membership application. Harper was not a witness, but the hearsay information which Fiske testified that he had gathered is to be contrasted with the testimony of John San Fellipo, another sales trainee, that on January 27 he and Harper were together when they signed applications for membership, that Harper was on the picket line that day, that he saw "very little of Harper on that picket line" thereafter, but that Harper was on it again perhaps as late as April after returning from a trip to Alabama. In further contrast with Fiske's testimony, there are certain additional facts. The Respondent has a large number of employees who are outside the appropriate unit and who, along with a minority of the employees in the unit, did not go on strike. Not one of those employees was a witness to testify that he had any difficulty in crossing the picket line. Moreover, there is the testimony of a majority of the employees within the unit that they and other employees engaged in picketing of their own free will. Finally, as mentioned above, the Board has decided the case in which the Union's unlawful picketing was litigated, *Brewery and Beverage Drivers and Workers, Local No. 67, supra.* There

the Trial Examiner found, and the Board agreed, that there was "no contention that the picketing at the plant was unlawful."

I find that the Respondent, by its refusal on January 27, 1953, and thereafter, to recognize the Union as the exclusive representative of the employees in the appropriate unit, refused to bargain collectively in violation of Section 8 (a) (5) and (1) of the Act.[73]

H. Conclusions concerning the strike

As we have seen, the immediate cause of the strike which began on January 27, 1953, was the Respondent's refusal to bargain collectively with the Union. The refusal has been persistent. At the time of the hearing, only four employees had sought reinstatement and the strike was still in progress. I find that the strike was caused and prolonged by the Respondent's unfair labor practices.

I. The solicitation of strikers to return to work

The record contains much testimony concerning conversations between striking employees and representatives of management, generally at the picket line outside the plant. The General Counsel contends that in a number of these conversations the Respondent unlawfully solicited strikers to return to work. I deem it unnecessary to recite the evidence and to make findings of fact, however. This is so because there is undisputed evidence of the Respondent's solicitation of strikers to desert the strike, and evidence of other solicitations need not be considered herein. We have seen above that by letters of February 12 and 13, 1953, to striking employees, the Respondent solicited their return

---

[73] Since my finding concerning the Union's majority status is based primarily upon the employees' participation in the strike, rather than upon applications for membership which employees signed, I do not reach the issue whether the Respondent's conduct before the strike began, such as the refusal to recognize the Union or the changes in the Respondent's practices respecting culls and the time of general sales meetings, also constituted violations of Section 8 (a) (5) of the Act.

to work. Such solicitation was calculated to undermine the Union and was a part of the Respondent's pattern of
8894 unlawful opposition to the purposes of the Act. It was, therefore, violative of Section 8 (a) (1) of the Act. *N. L. R. B.* v. *Clearfield Cheese Company, Inc.*, 213 F. 2d 70 (C. A. 3), enfg. 106 NLRB 417; *Efco Manufacturing, Inc.*, 108 NLRB 245.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent set forth in Section III, above, occurring in connection with the operations of the Respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead and have led to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent has engaged in unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

It has been found that the Union represented a majority of the employees in the appropriate unit and that the Respondent refused to bargain collectively with it. Accordingly, I shall recommend that the Respondent, upon request, bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit.

It has been found also that the strike which began on January 27, 1953, was caused and prolonged by the Respondent's unfair labor practices. Consequently, the strikers may not lawfully be replaced. *N. L. R. B.* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333. At the time of the hearing, the strike was still in progress and there had been only four applications for reinstatement, as mentioned

above. With respect to the right to reinstatement of some of the strikers, none of whom had applied for reinstatement at the time of the hearing, the Respondent advanced several contentions, namely, that certain of the strikers had obtained substantially equivalent employment, or did not wish reinstatement, or had signed letters of resignation of employment with the Respondent, or had engaged in misconduct as strikers which would justify the Respondent in denying reinstatement to them. On the other hand, the General Counsel contends that the letters of resignation were signed because of coercion on the part of the Respondent, and in other respects he disagrees with the Respondent's contentions. Evidence in support of these contentions was rejected, following objections by the General Counsel, for reasons which the transcript reflects.[74] The initial question to be determined was whether the strike was an unfair labor practice strike; if not, the evidence would be immaterial. Moreover, the issue of the reinstatement rights of particular individuals will arise only if and when such individuals make appropriate applications, at which time the Respondent's attitude toward their reinstatement may differ from its attitude at the time of the hearing. Consequently, I rejected the evidence, and offers of proof were made. I do not now pass upon the validity of any of the contentions recited therein. I hold as follows: that to the extent that the Respondent, upon valid grounds, may oppose the applications for reinstatement of certain strikers, the recommendations in the paragraph next below are not intended to preclude the right of the Respondent, at an appropriate time in compliance stages, to offer evidence in support of its refusal to reinstate certain strikers, at which time the General Counsel may offer evidence to the contrary. *Crowley's Milk Company, Inc., (Paterson Division),* 95 NLRB 1023, 98 NLRB 276.

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[74] One letter of resignation, that of Clements, was received early in the hearing without objection.

I shall recommend that the Respondent, upon ap-
8895 plication, offer immediate and full reinstatement to their former or substantially equivalent positions (*The Chase National Bank, etc.,* 65 NLRB 827), without prejudice to their seniority or other rights or privileges, to all those employees who went on strike on January 27, 1953, or thereafter, and who have not already been reinstated to said positions, dismissing, if necessary, any persons hired by the Respondent on or after January 27, 1953, who were not in the Respondent's employ on that date. I shall also recommend that the Respondent make whole each of them for any loss of pay he may suffer by reason of the Respondent's refusal, if any, to reinstate him as provided herein, by payment to him of a sum of money equal to that which he normally would have earned as wages or commissions, or both, as the individual case may be, during the period from five (5) days after the date upon which he applies for reinstatement to the date of a proper offer of reinstatement, less his net earnings (*Crossett Lumber Company,* 8 NLRB 440, 497-8) during said period, the payment to be computed upon a quarterly basis in the manner established by the Board in *F. W. Woolworth Company,* 90 NLRB 289. See also *N. L. R. B.* v. *Seven-Up Bottling Company, etc.,* 344 U. S. 344. I shall recommend also that the Respondent preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the rights of employment under the terms of these Recommendations.

In view of the nature and extent of the unfair labor practices committed, I am persuaded that the Respondent's conduct indicates a purpose to defeat the self-organization of its employees and that a danger exists that in the future the Respondent, unless restrained, will engage in other unfair labor practices. Accordingly, in order to make effective the interdependent guarantees of Section 7 of the

Act, I shall recommend that the Respondent cease and desist from, in any manner, infringing upon the rights guaranteed in said section. *N. L. R. B.* v. *Express Publishing Company,* 312 U. S. 426, 61 S. Ct. 693.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. The Union is a labor organization within the meaning of Section 2 (5) of the Act.
2. The driver-salesmen, the full service drivers, the cup route drivers, and the sales trainees at the Respondent's plant in Washington, D. C., constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.
3. The Union, on January 27, 1953, was, and at all times thereafter has been, the exclusive representative of all employees in such unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.
4. By refusing to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (5) of the Act.
5. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.
6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

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Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, and pursuant to Section 10 (c) of

the National Labor Relations Act, as amended, I hereby recommend that Washington Coca-Cola Bottling Works, Inc., Washington, D. C., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Brewery and Beverage Drivers and Workers, Local No. 67, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, as the exclusive representative of all its employees in the appropriate unit with respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Interrogating and threatening employees concerning union affiliation and activities in a manner constituting interference, restraint, or coercion in violation of Section 8 (a) (1) of the Act;

(c) Changing its practices concerning working conditions for the purpose of undermining the employees' union activities;

(d) Soliciting employees to discontinue protected concerted activities; and

(e) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Brewery and Beverage Drivers and Workers, Local No. 67, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Brewery and Beverage Drivers and Workers, Local No. 67, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, as the exclusive representative of all the employees in the aforesaid unit and, if an understanding is reached, embody such understanding in a signed agreement;

(b) Upon application, offer immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights or privileges, to all those employees who went on strike on January 27, 1953, or thereafter, and who have not already been reinstated to said positions, dismissing if necessary any persons hired by the Respondent on or after January 27, 1953, who were not in the Respondent's employ on that date, as provided in "The remedy";

(c) Make whole the employees specified in the paragraph next above, in the manner set forth in "The remedy," for any loss of pay they may suffer by reason of the Respondent's refusal, if any, to reinstate them;

(d) Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and rights of employment under the terms of these Recommendations;

(e) Post in conspicuous places in its plant in
8897 Washington, D. C., including all places where notices to employees are customarily posted, copies of the notice attached hereto as Appendix. Copies of said notice, to be furnished by the Regional Director for the Fifth Region, shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof, and maintained by it for at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material; and

(f) File with said Regional Director within twenty (20) days from the receipt of this Intermediate Report and Recommended Order a report in writing, setting forth in detail the steps which the Respondent has taken to comply herewith.

It is further recommended that unless the Respondent, within twenty (20) days from the receipt of this Intermediate Report and Recommended Order, notifies said Regional Director in writing that it will comply with the foregoing Recommendations, the National Labor Relations Board issue an Order requiring it to take the action aforesaid.

Dated at Washington, D. C., this 27 day of September 1955.

/s/ A. Bruce Hunt
A. Bruce Hunt
Trial Examiner

* * * * * * * * * *

8540

Received Feb. 6, 1953, NLRB, 5th Region, Baltimore, Maryland.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Charge Against Employer

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions.—File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

Case No. 5-CA-688.

Date filed: 2/6/53.

Compliance status checked by: MCG.

1. Employer against whom charge is brought.

Name of employer: Coca Cola Bottling Works, Inc., Washington, D. C.

Address of establishment (street and number, city, zone, and state): 400 - 7th Street, S. W., Washington, D. C.

Number of workers employed: 46.

Nature of employer's business: Bottling Coca Cola.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section

8 (a), subsections (1) and 8 (a) (5) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.):

(a) The Company has refused to bargain with Local Union No. 67, the representative of the Drivers and Driver-Salesmen of the said Company, notwithstanding repeated demands by the Union for recognition during the period January 15-27, 1953.

(b) During the period January 15-27, 1953, the Company questioned each of the subject employees individually as to their Union membership.

(c) On and after January 27, 1953, the date the employees struck, the Company offered wage increases and other inducements to certain employees if they would return to work.

(d) On and after January 27, 1953, the Company telephoned certain employees threatening them if they failed to return to work.

3. Full name of labor organization, including local name and number, or person filing charge: Brewery and Beverage Drivers and Workers Local No. 67, A.F.L.

4. Address (street and number, city, zone, and state): 720 5th Street, N. W., Washington, D. C.
Telephone No.: National 8-3051.

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A.F.L.

6. Address of National or International, if any (street and number, city, zone, and state). Telephone No.

7. Declaration.

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ Thomas A. Caton (Signature of representative of person filing charge).

Feb. 4, 1953 (Date).

Busn. Repr. Local 67 (Title, if any).

Willfully false statements on this charge can be punished by fine and imprisonment (U. S. Code, Title 18, Section 80).

* * * * * * * * * * *

8543

UNITED STATES OF AMERICA
BEFORE THE NATIONAL RELATIONS BOARD
FIFTH REGION

Case No. 5-CA-688

* * * * * * * * * * *

In the Matter of

WASHINGTON COCA COLA BOTTLING WORKS, INC.

and

BREWERY AND BEVERAGE DRIVERS AND WORKERS, LOCAL NO. 67, INTERKATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL

* * * * * * * * * * *

Complaint

* * * * * * * * * * *

VI.

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In order that employees of Respondent may have the full benefit of their right to self-organization and collective bargaining and otherwise effectuate the policies of the Act,

all drivers and driver-salesmen employed by the Respondent at the Washington, D. C., plant, excluding all other employees, office clerical, guards, professional and supervisory employees as defined in the Act, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9, subsection (b), of the act.

VII.

On or about January 15, 1953, a majority of the employees of Respondent in the unit described above in paragraph VI designated the Union as their representative for the purposes of collective bargaining with Respondent. At all times since that date, the Union has been the representative for the purposes of collective bargaining of a majority of Respondent's employees in the unit described above in paragraph VI and by virtue of Section 9, subsection (a), of the Act, has been and is now the exclusive representative of all the employees of Respondent in said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment or other conditions of employment.

VIII.

On or about January 15, 1953, and on various occasions thereafter, while Respondent was engaged in the operations described above in paragraphs I, II, and III, the Union requested the Respondent to bargain collectively with respect to rates of pay, wages, hours of employment or other conditions of employment with the Union as the exclusive representative of all the employees of Respondent in the unit described above in paragraph VI.

IX.

8547 On or about January 15, 1953, and at all times thereafter, down to and including the date of the issuance of this Complaint, Respondent did refuse and con-

tinues to refuse to recognize the Union and to bargain collectively with the Union as exclusive representative of all the employees of Respondent in the unit described above in paragraph VI.

* * * * * * * * * *

XI.

Respondent, by its refusal to bargain collectively with the Union as described above in paragraph IX, as the duly authorized representative of its employees in the unit set forth above in paragraph VI, did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8, subsection (a)(5), of the Act, and by said acts and conduct did interfere with, restrain and coerce its employees and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8, subsection (a)(1), of the Act.

XII.

On or about January 27, 1953, certain employees of the Respondent ceased work concertedly and went on strike.

* * * * * * * * * *

8552

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIFTH REGION

Case No. 5-CA-688

In the Matter of

WASHINGTON COCA COLA BOTTLING WORKS, INC.
and
BREWERY AND BEVERAGE DRIVERS AND WORKERS, LOCAL NO.

67, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL

Motion for Bill of Particulars

Now comes the Respondent Employer, Washington Coca Cola Bottling Works, Inc., by its attorneys, John T. Grigsby and Earle K. Shawe, and moves the General Counsel of the National Labor Relations Board to furnish the following particulars in order to enable said Respondent to understand the exact nature of the allegations contained in the Complaint issued by the National Labor Relations Board in the above entitled proceeding, and in order to permit the Respondent to adequately prepare its Answer and Defenses to said Complaint.

* * * * * * * * * *

12. The specific job classifications covered by the
8554 descriptive term "all drivers and driver-salesmen" as used in connection with the alleged appropriate unit set forth in Paragraph VI of the Complaint.

* * * * * * * * * *

8559 UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIFTH REGION

Case No. 5-CA-688

* * * * * * * * * *

In the Matter of

WASHINGTON COCA COLA BOTTLING WORKS, INC.

and

BREWERY AND BEVERAGE DRIVERS AND WORKERS, LOCAL NO. 67, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL

* * * * * * * * * *

Bill of Particulars

Pursuant to the Order of the Trial Examiner granting in part Respondent's Motion for a Bill of Particulars in the

above-entitled case, Counsel for the General Counsel submits the following:

* * * * * * * * * *

2. To particularize as to paragraph VI of the Complaint, the specific job classifications covered by the terms "all drivers and driver-salesmen" include Driver Salesmen, Full Service Drivers, Cup Route Drivers and Sales Trainee Drivers.

* * * * * * * * * *

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,883

BREWERY AND BEVERAGE DRIVERS AND WORKERS LOCAL UNION No. 67, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

BRIEF FOR PETITIONER

United States Court of Appeals
For the
District of Columbia Circuit
FILED NOV 15 1957
Joseph W. Stewart
CLERK

MARTIN F. O'DONOGHUE
THOMAS X. DUNN
PATRICK C. O'DONOGHUE
831 Tower Building
Washington 5, D. C.
Counsel for Petitioner

November 15, 1957

PRINTED BY RANDELL, INCORPORATED, WASHINGTON, D. C.

STATEMENT OF QUESTIONS PRESENTED

Whether the Board validly concluded that the Union did not make a proper bargaining demand and, therefore, the Company's refusal to bargain did not violate Section 8(a)(5) of the Act.

Whether, under these circumstances, the Board could validly conclude that the General Counsel had failed to sustain the allegations of the Complaint with respect to a refusal to bargain.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,883

BREWERY AND BEVERAGE DRIVERS AND WORKERS LOCAL UNION No. 67, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, *Petitioner,*

v.

NATIONAL LABOR RELATION BOARD, *Respondent*

BRIEF FOR PETITIONER

JURISDICTIONAL STATEMENT

This is a petition of Brewery and Beverage Drivers and Workers Local Union No. 67, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (hereinafter sometimes called the "Petitioner" and sometimes the "Union"), asking this Court to review the order (JA-7)[1] of the National Labor Relations Board (hereinafter sometimes called the "Board") issued against the Petitioner on April 19, 1957, pursuant to Section 10(c) of the Labor Management Relations Act (hereinafter sometimes referred to as the "Act"), as amended, 61 Stat. 136, 29 USC 151, et seq., and that that part of the Order of the Board be set aside, vacated and annulled wherein the Board found the Washington Coca-Cola Bottling Works, Inc. (hereinafter sometimes called the "Company" or "Coca Cola") had not violated Section 8(a)(5) of the Act by refusing to bargain with the Petitioner and that this Court order the Board to enter an Order requiring the Company to bargain with this Petitioner and, upon application, reinstate all employees who

[1] References to material printed in the Joint Appendix filed herein will hereinafter be referred to as "JA-".

went on strike on January 27, 1953, or thereafter and dismissing, if necessary, the replacements hired on or after January 27, 1953, who were not in the Company's employ on that date, and for such further relief in the premises as the rights and equities of the cause may require.

The jurisdiction of this Court is based upon Sections 10(e) and (f) of the Act. The Board's Decision and Order are reported at 117 NLRB No. 161.

Statement of the Case

In a prehearing conference stipulation, the parties briefly summarized the facts and stipulated that the facts were as found by the Trial Examiner and adopted by the Board (Prehearing Conference Stipulation set out in Appendix of Brief). A more detailed summary of the Board's findings of fact, conclusions and Order are as follows:

I. *The Board's Findings of Fact*

The Company is engaged in the bottling, sale and distribution of coca cola. It operates a plant in Washington, D. C. The plant's operations are highly specialized and fall within four departments: production, advertising, service and sales (JA-20). The sales department is composed of a sales manager and his assistant. Other personnel within the sales department are twelve sales supervisors, forty-four driver-salesmen, eight full service drivers, three cup route drivers and three sales trainees (JA-21, 22). The driver-salesmen, who are sometimes called conventional salesmen and route salesmen, sell and deliver bottled coca cola to retail outlets, each driver-salesman having a fixed route over which he travels by means of one of the Company's trucks. The full service drivers deliver bottled coca cola to dispensing machines owned by the Company and located in various types of establishments throughout the city. They fill the machines, make sure that same are in sanitary and working order, and collect empty bottles and the money in the machines' cash boxes. The cup route

drivers have duties similar to those of the full service drivers since each delivers coca cola to a dispensing machine. The cup route drivers, however, do not deliver bottled coca cola. They deliver the syrup and other essentials to machines which dispense the drink in paper cups. The work of both the full service and cup route drivers is a part of their training to become driver-salesmen. The sales trainees are persons in training to become full service or cup route drivers as a preliminary step to becoming driver-salesmen (JA-21, 22). The sales supervisors are supervisors within the meaning of the Act (JA-28). The routes of the route salesmen are divided into eight divisions, sometimes called conventional route divisions, each of which has a supervisor. There is one supervisor in the cup machine division and two in the full service division. The twelve supervisors have varied duties (JA-22).

During 1944 and 1948, following the filing of petitions by the Union, consent elections were conducted by the Board. The stipulated unit in each instance consisted of the driver-salesmen, that is the route or conventional salesmen, alone. The Union lost the first election by a vote of 25 to 5 and the second by a vote of 36 to 2 (JA-29).

At a meeting on January 14, 1953, a number of the Company's driver-salesmen met with representatives of the Union, signed applications for membership and agreed that Caton, the Union Business Agent, would promptly demand recognition of the Company. On January 15, Caton met with Plant Manager Fiske and, after informing him of the meeting the night before and the Union's majority status, asked recognition for "the men". Caton was informed that authority to recognize the Union could only come from Hobbs, the Company's Manager in Richmond. After Caton had left, Fiske contacted Hobbs and was told the Company would not recognize the Union unless it won a Board conducted election (JA-30, 31). On January 19, in answer to a telephone call from Caton, Fiske informed Caton of the Company's position. At this time, Caton asked Fiske to

"keep things clean" and informed Fiske that employees were being asked to go around and talk against the Union (JA-37).

At a meeting of the Compnay's driver-salesmen on January 23, it was unanimously agreed that Caton was to make one more demand for recognition and, if refused, a strike was to commence on January 27 (JA-44). On January 26, Caton presented for Fiske's signature a single paragraph document stating, in substance, Coca Cola agreed to recognize the Union as the sole labor organization representing the Company's drivers and driver-salesmen for the purpose of collective bargaining. Caton renewed his claim of majority status and stated that, if the Company failed to sign, a strike would commence the following day. Fiske called Hobbs and explained the situation and Hobbs told Fiske not to sign the document (JA-49, 50). On this note, the meeting terminated. Caton returned to the offices of the Union's attorney and prepared a letter directed to Fiske which stated in substance that this was to confirm the demand for collective bargaining agent of the drivers and driver-salesmen employed by the Company and to confirm a prior statement that the Union represented an overwhelming majority, i.e. 39 out of 46 of the drivers and driver-salesmen. That, notwithstanding the demand for recognition, the Company on repeated occasions over the past ten days had refused to bargain. Fiske received this letter some time that evening (JA-50).

On the morning of January 27, the Union began picketing the Company's plant. The Union had demanded recognition of the driver-salesmen who, by the letter of January 26, had been specifically identified as the route or conventional salesmen. The Trial Examiner and the Board found that an appropriate unit included not only the route salesmen but full service drivers, cup route drivers and sales trainees. On January 27, there were fifty-eight employees in such a unit. Of these fifty-eight employees, thirty-three testified that they had participated in the strike by volun-

tarily withholding their labor and by picketing at various times over a period of months. There was also reliable testimony by some of these thirty-three employees that seven additional employees engaged in strike activities. The Board affirmed the Trial Examiner's conclusion that the Union, at least by January 27, had a substantial majority in either the unit of forty-four driver-salesmen requested or the unit of fifty-eight employees found appropriate (JA-72,73).

At a conference on February 4 between the Union and the Company, the Company still insisted upon an election. The Union argued that, from a mere counting of the pickets on the street, it was clear they had a majority. A Union accusation that the Company had acted in bad faith and had sought to undermine the Union was met with silence (JA-82).

Neither at this meeting nor at any time from January 15 on did the Company ever raise any question of the appropriateness of the unit of the employees for which the bargaining demand had been made. On February 6, the Union filed a charge with the Board, charging the Company with a failure to bargain.

Beginning on January 15 up until the strike, the sales supervisors and Fiske interrogated route salesmen with threats and predictions of dire consequences resulting from union activity. The interrogations were numerous and reoccured daily from January 15 until the strike on January 27. On January 21, a special sales meeting was called at which time the Company announced a change of its policy regarding the practice of culls and the time of sales meetings (JA-31,39,41,57-59).

After Caton left Fiske on January 26, all route salesmen were interviewed individually by Fiske and other representatives of management until 8:00 that evening. The Company inquired concerning the employee's Union sympathy, belittled the forthcoming strike and sought to restrain some employees from striking (JA-51-55). The

Board affirmed the Trail Examiner's findings that the interrogations by the sales supervisors and the interviews on January 26 of the route salesmen clearly were intended to restrain and interfere with the employees' exercise of rights guaranteed by the Act and violated Section 8(a)(1); that the general sales meeting of January 21 was called for the purpose of undermining the employees' Union activity and violated Section 8(a)(1) and, further, a Company letter of February 13 to all striking employees violated Section 8(a)(1) (JA-3,58,59,81,84,85).

From the above, the Trial Examiner concluded that the Company's conduct painted a picture of an employer who was seeking to undermine a labor organization and who hoped that its employees would use an election as a means of repudiating their chosen representative; that the Company had no reasonable doubt about the majority status of the Union (JA-81,82) and, further, that the record was clear that the Company's insistence upon an election was not based upon a doubt as to either the confines of an appropriate unit or the unit of route salesmen for which Caton made demand (JA-79). The question of the appropriateness of the unit was an afterthought of the Company not raised until the hearing on the unfair labor practice charge.

The Complaint filed by the Board alleged as the appropriate unit "all drivers and driver-salesmen" at the Washington plant of the Company (JA-95) and, in the Bill of Particulars (JA-96) which was required of the General Counsel, acting for the charging party (the Union), the bargaining unit was therein more specifically defined as "all drivers and driver-salesmen; as the driver-salesmen, the full service drivers, the cup route drivers and the sales trainees" (JA-95,98). At the hearing before the Trial Examiner, the General Counsel stated on behalf of the charging party that either unit as above described would be appropriate but that he believed that "full service drivers, cup route drivers and the sales trainees should be

included with the unit of driver-salesmen" because their work is preparatory to becoming driver-salesmen (JA-59).

The Trial Examiner found that the unit as described in the Bill of Particulars was the appropriate unit (JA-71). In answer to the Company's objection that the Union did not make an express demand for recognition as a representative of employees in the unit which had been found to be appropriate, the Trial Examiner concluded that this circumstance did not constitute a fatal defect in the General Counsel's proof. That "in making a demand for an employer to recognize it, a labor organization is not required to be possessed of such clairvoyant powers as to set forth every category of fringe groups which the members of the Board at some future date after a detailed hearing would include within the unit". On the basis of *Barlow-Maney Laboratories, Inc.*, 65 NLRB 928, the Trial Examiner concluded that an 8(a)(5) charge could be sustained even though minor variations in the unit originally proposed by the charging labor organization had been made (JA-80).

The Trial Examiner concluded that the conduct of the Company, in addition to violating Section 8(a)(1) of the Act, violated Section 8(a)(5) by the Company's refusal to bargain with the majority representative of employees in an appropriate unit. Accordingly, the Trial Examiner recommended that the Company cease and desist from restraining and coercing employees in the exercise of the rights guaranteed by Section 7 of the Act and that the Company, upon application, offer immediate and full reinstatement to their former or substantially equivalent positions to all those employees who went on strike on January 27 and have not already been reinstated.

II. *The Board's Conclusions and Order*

The Board agreed with the Trial Examiner that the Company had violated Section 8(a)(1) of the Act and that its conduct demonstrated a clear pattern of interference,

restraint and coercion of its employees in their efforts to exercise the rights guaranteed to them in Section 7 of the Act (JA-2).

The Board, with one member dissenting, further agreed with the Trial Examiner's finding that the Company refused to bargain with the Union. However, this refusal to bargain did not violate Section 8(a)(5) of the Act since, as a prerequisite to a finding of the Company's refusal to bargain, the Union must have shown that it made a proper demand for bargaining. The Board concluded that a proper demand for bargaining had not been made in the instant case since the unit of driver-salesmen for which the Union demanded bargaining was substantially different from the unit alleged at the hearing and found by the Trial Examiner to be appropriate (JA-6-8).

Dissenting Board Member Murdock not only disagreed that a substantial variance existed, but stated that he would reject the variance argument. Murdock reasoned that the real question is not the variance but whether the unit requested was essentially appropriate. Murdock would hold that the addition of the other types of drivers numbering fourteen to a basic unit of forty-four employees and clearly ancillary to those sought by the Union does not change the essential nature of that unit. Therefore, a proper demand was made and the Company's refusal to bargain in good faith violated the Act (JA-14,15).

On the sixteenth day of May, 1957, the Union filed a Petition for Review of the Board's Order in this case.

Statement of Points

The Board erred in concluding that the Union did not make a bargaining demand in an appropriate unit. Therefore, the Company's refusal to bargain violated Section 8(a)(5) of the Act and the General Counsel sustained the allegations of the Complaint with respect to the refusal to bargain.

Summary of Argument

The obligation of an employer to bargain with a labor organization is conditioned on a majority representation of employees in an appropriate unit making a demand for bargaining.

The principal question in this case is whether the Board erred in concluding that the Union's demand for recognition as the majority representative of the Company's driver-salesmen was not a demand for bargaining in an appropriate unit. It is important to note at the outset that this is not the case of an employer expressing a good faith doubt as to the majority status of the Union or the appropriateness of the unit demanded and insisting on an election, but rather is the case of an employer refusing to bargain in good faith with a union and insisting on an election as a means to gain time to undermine the union by tactics that violated Section 8(a)(1) of the Act.

A. Three Board members arrived at their conclusions that the Union did not make a proper demand for bargaining by reasoning that there was a substantial variance between the unit of forty-four driver-salesmen requested and the unit found appropriate. This substantial variance consisted of the addition of what the Board called three categories or classifications of employees, fourteen in number, to the unit requested. Under the approach of the Board, the essential appropriateness or inappropriateness of the initial unit requested is of no importance. It is the unit later found appropriate that is determinative of the question of whether a demand in an appropriate unit has been made. The fallacies in the foregoing reasoning are many.

1. The alleged substantial variance is based on an addition to the unit of forty-four driver-salesmen requested of what the Board calls "classifications" of full service drivers, cup route drivers and sales trainees. All of the fourteen additional employees fall within the meaning of the term

driver-salesmen and, like the route salesmen, are in the same category of driver-salesmen. They are all engaged in driving trucks, dispensing coca cola in one form or another. The fourteen additional employees can be likened to apprentices to the route or driver-salesmen for the work of the full service and cup route drivers and sales trainees was part of their training to become driver-salesmen. In light of the very findings of fact of the Trial Examiner the Board adopted, the Board's substantial variance consists not in the addition of new categories to the category of employees demanded but any addition of employees to the category or unit of employees demanded constitutes a substantial variance.

2. The net effect of the Board's Decision is that it is incumbent on a Union to predict with accuracy and exactness the unit the Board will later determine appropriate. A proper demand for bargaining becomes an exercise in common law pleading with the penalty for mistakes as disastrous. In view of the flexibility of the Board decisions in the area of what are proper bargaining units, no union can meet the requirements of exactitude required by the Board in the instant case.

3. The Board's justification of its decision that, where a union is in doubt as to the appropriateness of a unit it may request an election, points up the untenable position of the Board's Decision. Under present Board doctrine, a union is faced with an election of remedies. It may capitulate to the employer's request for an election or it may file an unfair labor practice charge against the employer. If the union acquiesces to an election, it waives all unfair labor practice charges against the employer, including the employer's refusal to bargain in good faith. The election of remedies doctrine, coupled with the doctrine of predicting with exactitude the unit the Board may find appropriate in a given case marks the death knell of the entire collective bargaining process.

B. The decision of the Board is contrary to its own precedent. As Dissenting Member Murdock points out, the true basis for determining whether a demand in an appropriate unit has been made is not a comparison between the unit requested and the unit found appropriate, but whether the unit requested was essentially appropriate or inappropriate. Only if the unit requested is essentially or *per se* inappropriate has a Union failed to make a proper demand in an appropriate unit, thereby excusing an employer's refusal to bargain in bad faith. This is the only approach sanctioned by the language and legislative intent of Section 8(a)(5) of the Act.

1. The Union's demand for bargaining was not essentially inappropriate for not only was this the identically same unit of employees that participated in Board conducted consent elections in 1948 and 1952, but in the unit the Board found appropriate which necessarily is a relevant factor in considering the essential inappropriateness of the unit initially requested of forty-four route salesmen were the very heart of that unit. The other fourteen employees were ancillary to the basic unit requested. Further, under Board decisions driver-salesmen are essentially an appropriate unit.

2. At the cornerstone of the Taft-Hartley Act is the belief that the only solution to peaceful labor-management relations is the encouragement of labor and management bargaining in good faith. Adoption of the Board's requirement of a union's clairvoyantly predicting with exactitude the unit the Board may in the future find appropriate undermines the entire collective bargaining process and will license flagrant refusals to bargain in bad faith coupled with 8(a)(1) violations as practiced by the Company in the instant case.

Argument

Contrary to the Erroneous Conclusions of the Board, the Union Made a Proper Bargaining Demand and there-

fore, the Company's Refusal to Bargain Violated Section 8(a)(5) of the Act and the General Counsel Sustained the Allegations of the Complaint With Respect to a Refusal to Bargain

From a mere reading of Sections 8(a)(5) and 9(a) of the Act and from applicable court decisions, it can be seen that the employer's obligation to bargain is conditioned upon certain prerequisites. First, a demand must be made by a bargaining representative upon an employer to bargain. Second, the bargaining representative must have the authorization of a majority of the employees to bargain with the employer. Third, the employees authorizing the representative to act for them must constitute an appropriate bargaining unit.

Upon a demand for bargaining by a majority representative of employees in an appropriate unit, it is the employer's duty to commence bargaining even in the absence of a certification in a Board conducted election. The duty to bargain is not dependent upon certification. Certification is an alternate method of determining the proper representative where there is a dispute concerning the majority status of the representative or where the appropriateness of the bargaining unit is questioned. *NLRB* v. *Walstrom Metalic Door Co.,* 112 F(2d) 756 (CCA 2, 1940); *NLRB* v. *Steward,* 207 F (2d) 8 (CCA 5, 1953). An employer acts at his peril in refusing to recognize employees unless the facts show that the employer had a good faith doubt either as to the majority status of the representative or the appropriateness of the bargaining unit. *Idaho Potato Growers* v. *NLRB,* 144 F(2d) 295 (CCA 9, 1944); *NLRB* v. *Jackson Press, Inc.,* 201 F(2d) 541 (CCA 7, 1953). If the employer has such a good faith doubt and a union strikes rather than participate in a Board election to settle the questions of majority status or the appropriateness of a unit, the employer has an absolute defense to an 8(a)(5) charge of refusing to bar-

gain in good faith. However, where doubt as to the majority status or the appropriateness of a unit are merely a guise to gain time to destroy the union, the refusal to bargain is unjustified and violative of Section 8(a)(5) of the Act. *NLRB v. Inter-City Adv. Co.*, 190 F(2d) 420 (CCA 4, 1951); *Houston Chronicle Publishing Co.*, 211 F(2d) 848 (CCA 5, 1954); *NLRB* v. *Jackson Press, Inc., supra; Joy Silk Mills* v. *NLRB*, 87 App. D.C. 360, 185 F(2d) 732, cert. den'd 341 US 914.

In the instant case, the Company, in refusing to bargain until a Board election was had, did not base such refusal on any good faith doubt as to the majority status of the Union or the appropriateness of the unit requested. On the contrary, the Company demanded an election—period. The Company's questioning of the appropriateness of the unit requested was an afterthought raised for the first time by Company's counsel in the unfair labor practice hearing. The insistence upon an election was merely a means to gain time to undermine the Union by the tactics set out in the Trial Examiner's Report (JA-30-59) which both the Trial Examiner and the Board found flagrant violations of Section 8(a)(1) of the Act.

All members of the Board and the Trial Examiner were in agreement that the Company refused to bargain in good faith. However, the Board, unlike the Trial Examiner, found this refusal did not violate Section 8(a)(5) since a proper demand for bargaining had not been made by the Union.

A. *The Position of Board Members Leedom, Bean and Rogers and the Fallacies Therein*

Under Sections 8(a)(5) and 9(a) of the Act, a demand for bargaining is proper when made by a representative of employees who represents a majority of employees in an appropriate unit. There is no question in the case at bar of the majority status of the Union. The Union represented a majority of the employees in the unit for which it

demanded recognition and a majority of the employees in the unit which the Trial Examiner and the Board found appropriate. The case turns, rather, on whether the demand for bargaining was for employees in an appropriate unit.

The conclusion by the majority of the Board that a proper demand had not been made was based solely on an alleged substantial variance between the unit of employees requested and the unit found appropriate by the Trial Examiner and the Board. Both the Trial Examiner and Dissenting Board Member Murdock viewed the variance as minor. The technique used by the majority members of the Board to determine whether an appropriate unit had been demanded was to test the unit later found appropriate and compare it with the unit requested. Such a technique and its application in the instant case, for reasons discussed subsequently, is erroneous. According to the Board, a variance between the unit found appropriate and the unit requested renders the demand for bargaining improper. The Board characterizes the variance in the instant case as substantial. The import of the Board's Decision was that, if the variance had been minor rather than substantial, a proper demand for bargaining would have been made.

1. Characterization of the variance as substantial is not justified by the facts

The Board, in its Decision, gives no definition or analysis of the term substantial variance but merely states that a substantial variance existed between the unit requested of forty-four driver-salesmen and the addition in the unit of fifty-eight of the classifications of full service drivers, cup route drivers and sales trainees. The only hint that the Board gives us of the meaning of a substantial variance is their reply given to Dissenting Board Member Murdock's objection that this decision overrules *Sunset Lumber Co.*, 241 F(2d) 620 (CCA 2, 1957), enf. 115 NLRB 866. In *Sunset Lumber,* the union demanded bargaining for five truck drivers and a yardman. The Trial Examiner there rejected the contention that the appropriate unit consisted

only of these six employees and added three employees whose duties involved truck driving or yard work. Murdock stated that this was *"exactly the situation in the instant case"*. The Board majority, in reply, stated:

> "The degree of variance was more clearly marked here than there. In the cited case the only change by the Trial Examiner in the unit consisted of the addition of certain employees in the categories requested. Here, however, the changes consisted of the addition of three catgories of employees to the requested unit" (JA-6).

Certainly the number of employees added to the unit found appropriate is not the determinative factor for, in both the instant case and in *Sunset Lumber,* there was a one-third increase. Rather, the Board viewed the three additional employees of Sunset Lumber falling within the categories of truck drivers and yardmen requested, whereas, in the instant case, new categories were added to the category demanded. Reading *Sunset Lumber* together with the majority opinion in the instant case, the only logical conclusion is that, if the change is merely to add employees to the category demanded, then there is no substantial variance. But if new categories are added to the category demanded, then a substantial variance exists. However, the very findings of fact of the Trial Examiner adopted by the Board refute any such logical conclusion. Factually this case and *Sunset Lumber* are on all fours. They cannot be distinguished. Here as in *Sunset Lumber* the additional employees fell within the same category or classification of employees for which bargaining was demanded.

The Union made a demand for bargaining of driver-salesmen. By its letter of January 26, in stating that "we represent an overwhelming majority, i.e 39 out of 46, of the drivers and driver-salesmen" (JA-50), it was clear beyond a doubt whom the Union was claiming, namely the route salesmen. In addition to forty-four route salesmen and fourteen supervisors, there were in the sales depart-

ment of the Company eight full service drivers, three cup route drivers and three sales trainees. The difference in the job content of all the employees in this department, other than the supervisors, was minute. Basically, the job content of a route salesman or driver-salesman, as they were interchangeably called, was to sell and deliver bottled coca cola to retail outlets throughout the city. As Dissenting Member Murdock states, they would be categorized as individuals driving trucks and dispensing coca cola. The job of the full service drivers, cup route drivers and sales trainees also was to drive trucks and dispense coca cola to retail outlets. They differed from the route salesmen only in that the full service drivers served coolers owned by the Company and the cup route drivers served machines which dispense coca cola in paper cups. Necessarily then the full service drivers and cup route drivers fell within the same category as driver-salesmen. This becomes even clearer when it is remembered that the full service and cup route drivers and sales trainees all are in training to become route or driver-salesmen (JA-21,22,62). The first preliminary step to becoming a driver-salesman was a sales trainee; then from sales trainee to a cup route driver to full service to driver-salesman.

In effect, the job of trainee, full service or cup route driver was an apprenticeship to becoming a route salesman. An analogous situation would be where a demand was made for a unit of forty-four carpenters and fourteen apprentice carpenters were added to the unit by the Board or the Trial Examiner. No one could possibly say the apprentices did not fall within the category of carpenters. Similarly, as Dissenting Board Member Murdock concluded, it is idle talk to say the full service, cup route and sales trainees did not fall within the category of driver-salesmen.

The only conclusion that can be drawn is that the Board's Decision is contrary to the Second Circuit's decision in the *Sunset Lumber* case and that the term "substantial variance" as used by the Board is something less than its

ominous meaning would have one to believe. Upon analysis, it is clear that, in the instant case, it is not the addition of new categories of employees to the category the Union demanded that is the "substantial variance", but rather the Board is holding that any addition of employees to the category or unit of employees demanded constitutes a substantial variance. This is nothing more than saying that, where there is any variance between the unit requested and the unit found appropriate, the demand for bargaining is inappropriate. Certainly this is the position of Board Member Bean who would have disposed of the instant case on the ground that:

> "The Respondent's refusal to bargain with the Union as the asserted representative of a unit different from that for which bargaining was requested, is not violative of Section 8(a)(5) of the Act" (JA-6).

From the facts found by the Trial Examiner as adopted by the Board, this difference of Bean's and the substantial variance of Rogers and Leedom mean one and the same thing, namely that where a union demands a certain category of employees doing a particular type of work, the union demand must encompass all the employees doing that type of work. In other words, it must predict with certainty and make a demand for all the employees doing a certain type of work. The net result is that it is incumbent on a union to predict with accuracy and exactness the unit the Board will later determine appropriate.

In the face of the Board's position that the appropriateness of units must be determined on a case by case basis, the impossibility of the Board's requirement in the instant case is readily apparent. The Board defends this requirement of exactitude by answering the Union can request an election if it has any doubt of the appropriateness of a unit, without mention of the fact that, in adopting such a course of action, all unfair labor practice charges against an employer are waived. The harshness of such a justifica-

tion of the Board majority's decision will subsequently be more fully discussed.

In support of such a doctrine of exactitude, the Board relies on the *Barlow-Maney Laboratories* case, *supra.* It is submitted that this decision, as amplified and explained by later decisions, does not stand for the proposition espoused by the Board in this case. On the contrary, in *Barlow-Maney* and later cases, whether a proper demand is made is dependent primarily upon the majority status of the union in both the unit requested and the unit found appropriate and on whether the unit requested was not essentially inappropriate. In other words, to determine whether the demand was made in an appropriate unit, it is the appropriateness of the unit requested that is determinative—not the unit later found appropriate. Any other approach is in conflict with the language and intent of the Act. To be required to know whether a unit is essentially inappropriate is a far cry from the obligation to guess with exactitude the unit in a given case the Board is going to find appropriate. Under this proper approach, the Board's responsibility in the instant case to determine whether the unit of forty-four route salesmen was essentially inappropriate and is not whether there were variations between the unit requested and the unit found appropriate.

2. The Board's Decision would require a union to predict with exactitude the scope of a unit the Board may in the future find appropriate and is impossible to comply with.

Unions cannot comply with the implicit holding of the instant case that a union must predict with exactitude the unit that eventually will be found appropriate by the Board. This is an impossible requirement. As the Board has reiterated time and time again, the designation of a unit appropriate for the purposes of collecting bargaining must be confined to the evidence and circumstances particular to each individual case. *Bendix Products Corp.,*

3 NLRB 682. Further, when the Board determines a unit is appropriate, this is not a determination that the unit is the most appropriate or the only appropriate unit but only that it is appropriate. *Morand Bros. Beverage Co.* (1950), 91 NLRB 409. There may be more than one appropriate unit in a given case, as evidenced by Board decisions allowing the results of Board elections to be determinative of the unit or units that are appropriate. *Terre Haute Coca Cola Bottling Co.*, 100 NLRB 435.

As a practical matter, in representation cases units usually will be petitioned in the alternative with the Board seldom finding appropriate a unit identical with the unit requested. This is especially true in forecasting every employee that belongs in a unit. It is one thing to petition for a unit of carpenters or driver-salesmen and another to forecast every employee that properly should fall within that category. But that is what the Board is now demanding by its Decision. This is a flexible, ever-changing field where Board decisions are inconsistent with each other. *NLRB* v. *Calumet Steel D., etc.*, (CCA 7, 1941), 121 F(2d) 366.

With respect to driver-salesmen in Coca Cola plants, the Board has not followed any uniform policy but has taken each case on its own facts. The Board has held that driver-salesmen may constitute a separate unit, *Rockford Coca Cola Bottling Corp.*, 81 NLRB 579; *Raleigh Coca Cola Bottling Workers*, 80 NLRB 768; *Snowflake Bakery Corporation of Hawaii, Limited*, 110 NLRB 324 (cases cited therein), or that such a unit may also embrace the trainees for such work, *Seven Up Bottling Co. of Miami*, 92 NLRB 1622, or the driver-salesmen and their helpers, *Atlanta Coca Cola Bottling Co.*, 83 NLRB 187. The Board has also held that driver-salesmen may be included within a unit of production and maintenance employees, *Rockford Coca Cola Bottling Co., supra; Martinelli Company*, 99 NLRB 43. On occasion, the Board has also utilized the procedure of self-determination elections with regard to driver-

salesmen whereby the employees themselves decide the question whether to have a limited or larger unit. *Terre Haute Coca Cola Bottling Co., Inc., supra.* It is evident then that, to require the union to forecast with absolute certainty the unit the Board will deem appropriate in every case is a hopeless task.

The choice by the Board majority of the principle of "substantial variance" is indicative of what the Board has in mind for 8(a)(5) violations of the Act. The principle of variance is usually employed with reference to pleading and practice. Section 41, Am. Jur. 546; Black's Law Dictionary (3rd Ed., 1933), p. 1800. The old strictness of the common law principles of variance that any variance was fatal to a claim has been rejected by present day courts. Today a variance is material only where it actually misleads the opposing party to his prejudice in maintaining his cause of action or defense. 41 Am. Jur. 548. In the instant case, there is no question of anyone being misled. On the contrary, the employer in no way questioned the appropriateness of the unit requested. Thus the Board, by its adoption of this pleading principle, is resorting not to present day concepts of pleading but to unanimously rejected theories of the common law. The Board is attempting to make a union's demand for bargaining in a particular unit an exercise in court pleading. Such an approach to a union's demand for bargaining was rejected by this Court when it stated in *Joy Silk Mills v. NLRB, supra*:

> "Nor must the request to bargain be in *haec verba,* so long as there was one by clear implication. The Labor Management Relations Act is not a statute of frauds or an act prescribing the formalities of conveyancing. No seal or writing is required by its terms. Nor is any special formula or forms of words" *Lebanon Steel Foundary v. Board,* 76 App. D.C. 100, 130 F(2d) 404, 407

With the fostering of collective bargaining, the cornerstone of labor relations legislation, the Board's Decision in

the instant case of making a union's demand for bargaining an exercise in pleading through its construction of 8(a)(5) must *per se* be a misinterpretation of the legislative will.

3. Contrary to the Board's assertion in justification of its Decision, the Union does not have open to it a Board election if it is in doubt as to the appropriateness of the unit requested

The Board pleads that it does not require that a labor organization shall always precisely define the unit it seeks to represent nor does its holding place an undue or improper burden upon the union in an instance where it has not sought the benefit of a Board election. The Board suggests in justification of its Decision that, if parties are in dispute or if any doubt exists as to the appropriate composition of the unit, the law has provided a ready recourse in the Board's representation procedures. This decision is the union's punishment for striking rather than using the Board's election procedures.

An inspection of the Board's suggested course of action points up the untenable position unions have been placed in. The Board's suggested remedy is perfectly proper where an employer expresses good faith doubt concerning the appropriateness of the unit for which a bargaining demand has been made. In such a case, it is incumbent on a union to abide by a Board election. If the union refuses, the employer has an absolute defense to an 8(a)(5) charge.

However, that situation is inapposite here. The Company never once raised any question of the appropriateness of the unit requested. On the contrary, the Company in bad faith insisted on an election. Once it had refused to bargain, it embarked on a course of action of destroying the Union's majority by flagrant violations of Section 8(a)(1) of the Act. In such a situation where an employer insists upon an election in bad faith in order for time to destroy the Union, if the Union could agree to the election and then if it lost because the employer's unfair labor

practices had destroyed the majority status, it could file unfair labor practice charges, the union would be protected to a certain extent. However, under present Board doctrine, the union is faced with an election of remedies. It may capitulate to the employer's request for an election or it may file an unfair labor practice charge against the employer. It may not do both. If the Union acquiesces to an election, it waives all the unfair labor practices committed by the employer, including the employer's refusal to bargain in good faith. This exclusiveness of remedies is explained by the Board in *Aielo Dairy Farms,* 110 NLRB 1365, where a complaint alleging a violation of 8(a)(5) was dismissed on the grounds that any of the employer's unfair labor practices had been waived by the union's proceeding to a representation election. Dissenting Member Murdock quotes pertinent portions of this decision in his opinion (JA-12,13). See also *Franchester Corp.,* 110 NLRB 1391, and *Rupp Equipment Co.,* 112 NLRB 1315.

With the Board's forcing of a choice of remedies on a union where the employer has embarked on a course of unfair labor practices to destroy its majority, no union can possibly wait a few weeks and rely on winning a Board election. If it should lose, all unfair labor practice charges would be waived. Thus, it is by necessity faced with choosing the unfair labor practice procedure. But now, under this decision, even where the employer has raised no doubt as to the appropriateness of the unit requested, any difference between the unit requested and the unit found appropriate constitutes failure to make a proper bargaining demand and defeats the failure to bargain charge.

Needless to say, this Decision will license refusals to bargain and unfair labor practices by unscrupulous employers. Its effect will be to undermine the entire collective bargaining process and place a union without a remedy to combat an employer who, in bad faith, refuses to bargain.

B. *Under Board Precedent, the True Basis of Determining Whether a Demand Has Been Made in an Appropriate Unit is not a Comparison Between the Unit Requested and the Unit Found Appropriate but Whether the Unit Requested was Essentially inappropriate*

Both the Trial Examiner and the Board rely on the *Barlow-Maney* case as authority for the result reached in their decisions. Their approach is identical in that both compare the unit found appropriate with the unit requested to determine whether a demand was made in an appropriate unit. Both find a variance existed between the two. The Trial Examiner characterizes it as a minor variance; the Board as substantial. It is submitted that this approach is contrary to the Board's own precedent resulting from a misunderstanding of the *Barlow-Maney* decision and that the Trial Examiner, in the first instance, led the Board astray. *Barlow-Maney* can only be understood when read in connection with later decisions that amplify and explain it.

In *Barlow-Maney,* the union had made a bargaining demand for a unit larger than the unit found appropriate by the Trial Examiner. Although the union had a majority in the smaller unit, it never had a majority in the unit requested. The Board, in resting the case solely on the lack of the union's majority among the very group, in which it made an allegation of majority status to the employer, stated:

> "It seems to overlook the fact that in order to make out a case of refusal to bargain, the Board must show that the Union in fact represented a majority at the time the request was made. The employer's objection arises as of that time, not as of the time that a Trial Examiner, or the Board, finds a different unit appropriate; it should be measured against the unit claimed to be appropriate at that time."

Thus, the Board measured the majority satus of the Union against the initial request. In *Smith Transfer Co., Inc.,* 100 NLRB 834, the Board made it clear that the question of

whether the demand was in an appropriate unit was also to be determined by the unit initially claimed, not some unit later found appropriate. Further, in this latter decision the Board established a standard for determining whether the unit initially claimed was a demand in an appropriate unit, namely if the unit was not essentially inappropriate a proper demand had been made. The Board stated:

> "We agree with the Respondent that in computing the Union's majority for purposes of determining the refusal-to-bargain issues, the unit to be utilized is that claimed by the Union to be appropriate at the time of the request rather than that found appropriate at this time, assuming the two to be different in scope, and assuming also that the claimed unit is not essentially inappropriate. We also agree that the Union's request to bargain for the 'boys' was ambiguous, at least as of May 19 and, that although the Respondent did not then raise any unit issue, the request could reasonably have been construed either as a request to bargain for a unit limited to the Respondent's truck drivers alone or as a request for a unit including the 'grease mechanics' classification. Where such ambiguity in the bargaining request exists, we have held in effect that the Union must have in fact represented a majority in the larger, as well as the smaller, appropriate unit as a condition precedent to ascertain a violation of Section 8(a)(5) of the Act. We are satisfied from the record, however, the Union here did have a majority of designations in both equally appropriate units and we so find."

In *Smith-Transfer Co., Inc.*, the union had demanded recognition of a unit of truck drivers. The Trial Examiner found that an appropriate unit should also include "grease mechanics". But the Board stated that "a unit of truck drivers including the fringe 'grease mechanics' category would not be essentially inappropriate" and, accordingly, held the refusal to bargain could not be justified under the rulings in *C. L. Bailey Grocery Co.*, 100 NLRB 576, and *Barlow-Maney* on the grounds that "no proper request to

bargain" had been made. In this case, the Board also distinguished its holding in the *International Broadcasting, Inc.* case, 99 NLRB 130, where it had held that an employer was under no statutory duty to honor the union's request for bargaining in view of the inappropriateness of the combined unit of announcers and control operators embraced in the union's request for bargaining. The Board stated that, in the *International Broadcasting, Inc.* case, the unit requested was *per se* inappropriate.

In *C. L. Bailey Grocery Co., supra,* referred to by the Board in this case, the union actually intended to make a demand for a departmental unit of warehousemen, truck drivers and helpers but made a demand for what could rightfully have been interpreted by the employer as a demand for a plant-wide unit in which the union did not have a majority. The Board, stating it did not believe it was incumbent on an employer to resolve an ambiguity in a request to bargain, held the union had made a demand for the plant-wide unit and, since it did not have a majority in that unit, had not made a proper demand for bargaining. It is clear from the above cases that, if the union makes a demand for bargaining as representative of a majority of employees in what is not an essentially inappropriate unit and it is the majority representative of employees in the unit requested and the unit later found appropriate, the conditions precedent to the employer's obligation to bargain have been met.

The Board, until its decision in the instant case, followed the principles enunciated in *Barlow-Maney,*[2] *Smith Transfer*[3] and *Bailey Grocery.*[4] These principles have recently, by implication received judicial approval by the Second

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[2] *Goddard & Co., Inc.,* 105 NLRB 858 (union had majority in unit requested but not majority in larger unit found appropriate).

[3] *Endicott-Johnson Corp.,* 108 NLRB 88 (unit demanded essentially inappropriate although majority).

[4] *Parker Brothers & Co., Inc.,* 101 NLRB 872 (union did not represent majority in unit requested). See also *Carry Lumber Co.,* 102 NLRB 406; *Mike Persia Chevrolet Co.,* 107 NLRB 377.

Circuit in *Sunset Lumber, supra,* previously discussed. The Court, in affirming the Board, rejected the employer's contentions that a proper demand for bargaining had been made even though the unit found appropriate included certain employees the union never made a demand for. It appears that the departure of the Board in this case from the principles of *Smith Transfer Co.* is not a one shot affair.

In the later decision of *Joslin Dry Goods Co.,* 118 NLRB No. 71, the union made a demand for recognition for all the employees in the company's warehouse. The warehouse was made up of seventeen employees, eight television and appliance repairmen and nine truck drivers and warehousemen. The Board found the repairmen and the warehousemen should have been separate units and, citing the instant case and, although the union had a majority in the smaller as well as larger units, reasoned there existed a substantial variance between the unit requested and the unit found appropriate which excused the company's refusal to bargain in good faith. The company in that case also engaged in 8(a)(1) tactics to defeat the union.

How the Board can square that decision with *Graham County Electric Coop. Inc.,* 96 NLRB 684, is difficult to understand. In *Graham,* the union had demanded recognition of all the company's employees—seventeen production workers and five office clerical employees. The Board found appropriate separate units but, since the union had a majority of the employees in either a plant-wide unit or separate units, held the employer's refusal to bargain violated the Act.

It is apparent that the Board has embarked on a new doctrine of exactitude with regard to Section 8(a)(5) of the Act. This doctrine is without sound support. There is absolutely nothing in Sections 8(a)(5) or 9(a) that warrants the Board's using some unit later determined to be appropriate as the sole criteria of whether a demand has been made in an appropriate unit. Logically, it is appro-

priateness or inappropriateness of the unit requested that is determinative. A later Board determination is a relevant factor in making such a determination but to try and read into these sections of the Act that this is the only factor and if there is any variance between the two a proper demand has not been made, is error. Such a doctrine completely ignores the nature of the Board's unit determinations. When the Board makes a determination under 9(b) of the Act of what is or is not an appropriate unit, the unit that is determined to be appropriate is not the *only* appropriate unit or the *ultimate* appropriate unit, but only the unit the Board, at that time, feels will aid employees in the exercise of rights guaranteed by Section 9 of the Act.

In *Morand Brothers, supra,* faced with a question of whether a union that had been conducting association-wide bargaining for a number of years refused to bargain and violated Section 8(b)(3) by insisting on separate bargaining with employers, the Board in its decision shed light on this problem when it stated:

> "There remains for consideration the issue of whether the Local's proposals for separate bargaining, with or without the intervention of the Associations, violated its duty under Section 8(b)(3) to bargain on the basis of an appropriate unit. We cannot agree with the dissenting opinion that the association-wide unit was the only appropriate unit in this case and that single-employer units would necessarily be inappropriate where, as in the instant case, the parties have exhausted the possibility of reaching agreement on the basis of a multiemployer unit. There is nothing in the statute which requires that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit; the Act requires only that the unit be 'appropriate'. It must be appropriate to ensure to employees, in each case, 'the fullest freedom in exercising the rights guaranteed by this Act.' Balancing the instability resulting from the collapse of negotiations on a multi-employer basis against the benefits

> to be derived from further collective bargaining on a single-employer basis, we conclude that, in this case, to ensure the fullest freedom in exercising the collective bargaining rights guaranteed to employees single-employer units could be found appropriate.
>
> * * * * *
>
> "Moreover, even if we were to hold that the association-wide unit is the only appropriate unit in this case, it would still not follow that the Local's conduct violated the Act. While it is true that under the view any bargaining on a single-employer basis with a particular Respondent would be limited to a segment of the appropriate, multiemployer unit, Section 8(b)(3) does not, in our opinion, require that all the employees in an appropriate unit, particularly in a multiemployer unit, be bargained for simultaneously, or that they be covered by the same contract. It is sufficient that the party seeking to bargain for a portion of the statutory unit intends, as did the Local in this case, to negotiate at an appropriate time for the rest of the employees in such unit."

Underlying the *Morand* decision is the principal that none can say with any degree of certainty what is or is not the ultimate or most appropriate unit. Congress realized this when, in Section 9(b), it directed determination to be made on a case by case basis. In *Morand,* the Board did not attempt to decide whether an association unit was more or less appropriate than a separate unit, but only whether the separate unit requested was appropriate. The Board herein has taken a different tact and reasons that, irrespective of the essential appropriateness of the unit requested, this unit is compared with some unit the Board later finds appropriate. The Board has in effect set up this later unit as the most or ultimate appropriate unit.

The Board has reached this result even with full knowledge that the appropriateness of units depends on many relevant factors, that such determinations are only made after lengthy hearings and searching analysis of the job

tasks and relationship of many employees one to the other. No union, where only attempting to organize a plant, has the opportunity to make such an analysis and make a precise determination of all the inclusions and exclusions in a unit. True, the union should be able to determine whether a particular unit is essentially inappropriate, but to know accurately the unit the Board may find appropriate in a given case is impossible.

In the light of the above, it is clear that the essential appropriateness criteria of Dissenting Board Member Murdock is the *only* practical basis upon which to judge whether a demand has been made in an appropriate unit and preserve the collective bargaining process.

1. The unit requested by the Union was not essentially inappropriate

The Union herein met the standard of essential appropriateness. The demand was for a unit of driver-salesmen. Under prior Board decisions and the Board decision in the instant case, driver-salesmen are an essentially appropriate unit. *Rockford Coca Cola Bottling Co., supra; Raleigh Coca Cola Bottling Workers, supra; Snowflake Bakery Corporation of Hawaii, Limited, supra.* The Board's objection is not that basically driver-salesmen were an inappropriate unit but that the Union did not request fourteen employees who were also driver-salesmen. The Union did not make a demand for these employees. However, a request for the route salesmen was a request for the heart, the substance of an appropriate unit of driver-salesmen. As Dissenting Member Murdock states, the very essence of the unit was requested; only a few ancillary employees were not requested. The addition of these employees in no way changed the essential nature of the unit. As has been previously pointed out, these fourteen employees were trainees or apprentices. The addition of a small number of apprentices does not change the essential nature of a unit. No doubt if only these fourteen ancillary

employees had been requested, the Union would not have demanded the very essence of the unit of driver-salesmen. However, that was not the case and the unit requested was not essentially inappropriate but *per se* appropriate.

The crowning blow to the Board majority decision is the Board's failure to consider the two previous consent elections in which the Company and the Union had agreed that an appropriate unit was a unit of the route salesmen. The prior consent elections are, in and of themselves, determinative of whether the Union made a demand in an appropriate unit. An employer may not defend his refusal to bargain with a Union on the ground that the bargaining unit is inapproprate when such unit has been determined appropriate in a prior proceeding and where circumstances underlying unit finding have not changed since the representation proceeding. *May Department Stores v. NLRB,* 326 U.S. 376; *Westinghouse Electric Corporation* v. *NLRB,* 236 F(2d) 939 (CCA 3, 1956); *National Carbon Co.,* 110 NLRB 2184; *Phillips Petroleum Co.,* 100 NLRB 684; *Pacific Telephone & Telegraph Co.,* 113 NLRB 478; *Cenlar Bros. Mfg. Co.,* 88 NLRB 107. Further it is not necessary that the Board has not determined the unit upon the basis of a record made at a formal hearing as distinguished from the parties' consent stipulation. In *The Baker and Taylor Co.,* 109 NLRB 245, an employer defended his refusal to bargain on the grounds that the consent stipulation was not binding. The Board stated:

> "We do not agree with this contention. It has long been the Board's policy not to permit relitigation, in a proceeding based on charges of refusal to bargain, of the issues decided in a prior representation proceeding. In the absence of evidence of changes in the facts surrounding a prior unit determination, or the discovery of evidence unavailable to the respondent in the representation proceeding, the Board has uniformly refused to redetermine unit issue in an unfair labor practice proceeding. This principle is applicable equally to cases in which the necessary facts are determined by the Board upon the record of a hearing and

> to cases in which the parties have consented to expedite resolution of a question of representation by agreeing to the determinative facts for purposes of conducting an election. The consent election is a well-established time and labor-saving device, and its validity is specifically recognized by the provisions of the amended Act."

The Board in the instant case deviated from the principals enunciated above.[5] Although there had been no change in Company's operation, it allowed the employer to relitigate a prior unit determination. This is not only contrary to Board precedent but contrary to Circuit Court decisions that refuse to allow an employer who, in refusing to bargain in good faith has never raised any question of the appropriateness of the unit requested, to later justify the refusal on such ground. *NLRB* v. *Clarksburg Publishing Co.*, 120 F(2d) 976 (CCA 4, 1941); *NLRB* v. *Inter-City Adv. Co., supra; NLRB* v. *Federbush Co.*, 121 F(2d) 954 (CCA 2, 1941). It was error for the Board to allow the Company to question the appropriateness of the unit requested in view of the two consent election stipulations and the failure at any time during negotiations with the Union to question the appropriateness of the unit requested.

Accordingly, the Union made a proper demand for bargaining and the allegations of the General Counsel in this respect were supported by the record. Therefore, the Company's refusal to bargain violated Section 8(a)(5) of the Act.

Conclusion

The foregoing discussion, we believe, amply demonstrates that, on the facts, the real holding of Board Members Leedom, Bean and Rogers is that any difference in the unit of employees requested and the unit later found appropriate by the Board renders the demand for bargain-

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[5] The union in the *Taylor* case won the election, whereas in the instant case the Union lost both elections. However, the Court's exposition of the nature of consent election units would be applicable in either situation.

ing improper and excuses an employer's refusal to bargain. With the Board's unit determination by nature flexible, such a requirement of exactitude turns a demand for bargaining into an exercise of pleading. Such a standard of exactitude will license flagrant refusals to bargain in bad faith as practiced by the Company. The majority decision can be justified by neither judicial precedent or the language of the Act. It is a radical departure from past Board policy that undermines effective enforcement of Section 8(a)(5) and, in turn, the fundamental principles of the Act.

It is respectfully submitted that the Board's Order herein should be set aside and its petition for enforcement denied.

Respectfully submitted,

PATRICK C. O'DONOGHUE
Counsel for Petitioner

APPENDIX

The pertinent portions of the Labor Management Relations Act of 1947, as amended (61 Stat. 136, 29 USC 151, et seq.), are as follows:

"*Section 8(a)* It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

"*Section 9(a)* Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of

the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it included, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."

Through inadvertence, the following document was omitted from the printing of the Joint Appendix:

"PREHEARING CONFERENCE STIPULATION

Pursuant to Rule 38(k) of the Rules of this Court, the parties, subject to the approval of this Court, do hereby stipulate and agree as follows:

1. The case may be heard and determined upon the following record, which shall be printed as an appendix to Petitioner's Brief:

(a) The Decision and Order of the Board with concurring and dissenting opinions;

(b) The Intermediate Report of the Trial Examiner;

(c) Petitioner's charge;

(d) The Complaint (only Paragraphs VI, VII, VIII, IX, XI and XII);

(e) The Company's motion for a bill of particulars (only opening paragraphs and item 12);

(f) General Counsel's bill of particulars (only opening paragraph and item 2).

2. The parties hereto stipulate that the facts are as found by the Trial Examiner and adopted by the Board. In brief, these facts are that, during a drive by the Union to enlist company employees, the Company engaged in acts of interference, restraint and coercion violative of Section 8(a)(1) of the Act. The Union's drive was successful,

however, and it thereafter requested the Company to bargain as to its driver-salesmen. The Company, while not challenging the appropriateness of such a unit, refused the Union's request. Thereafter, the Board's General Counsel issued a complaint in part alleging, as specified in a bill of particulars, a refusal to bargain with respect to a unit consisting of the Company's driver-salesmen, full service drivers, cup route drivers and salesmen trainees. At the time of such alleged refusal to bargain, the Union represented a majority of the employees in either the larger or the smaller group. The Board dismissed the complaint on the grounds that the proof showed a request to bargain for a unit of drivers and driver-salesmen alone and that this was a unit "substantially different" from the unit alleged in the complaint and found by the Board to be appropriate.

3. The parties hereto stipulate that the following questions are presented:

(a) Whether the Board validly concluded that the Union did not make a proper bargaining demand and, therefore, the Company's refusal to bargain did not violate Section 8(a)(5) of the Act.

(b) Whether, under these circumstances, the Board could validly conclude that the General Counsel had failed to sustain the allegations of the complaint with respect to a refusal to bargain.

4. The Petitioner shall file and serve the appendix to its Brief on or before October 14, 1957. The Petitioner shall file its Brief on or before November 1, 1957. The Board shall file its Brief on or before December 2, 1957. Petitioner shall file its Reply Brief, if any, on or before December 18, 1957.

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Attorney for Petitioner

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Attorney for Respondent

September 18, 1957"

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,883

BREWERY AND BEVERAGE DRIVERS AND WORKERS, LOCAL No. 67, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

JEROME D. FENTON,
General Counsel,
STEPHEN LEONARD,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
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WILLIAM J. AVRUTIS,
Attorneys,
National Labor Relations Board.

United States Court of Appeals
For the
District of Columbia Circuit

FILED DEC 16 1957

Joseph W. Stewart
CLERK

QUESTIONS PRESENTED

The questions presented are correctly stated by petitioner.

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v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

COUNTERSTATEMENT OF THE CASE

The Board supplements the facts set forth in petitioner's [1] Statement of the Case with the following:

The Company's driver-salesmen are primarily salesmen. Of all the employees in the Company's sales department they alone deal with the Company's retail customers (J. A. 21–22, 61–62). As part of their efforts

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[1] In accordance with the terminology employed in petitioner's brief, we refer to petitioner as "the Union", and to the Washington Coca Cola Bottling Works as "the Company".

to promote the sale of the Company's product, they seek permission to erect advertising material on the customers' premises (J. A. 61). The driver-salesmen also solicit new business and seek orders for coolers used in selling Coca Cola (J. A. 61). They are paid on a commission basis for their work (J. A. 25, 28, n. 12, 61).

The Company's full-service drivers, cup route drivers, and sales-trainees are essentially delivery drivers who keep company-owned vending machines stocked with the Company's product (J. A. 21–22, 61–62).

Until January 27, 1953, the first day of the strike, the Union made no effort to organize any employees other than the driver-salesmen. Its effort at that time arose out of the fear that the other employees, if unorganized, might handle the routes of the striking driver-salesmen (J. A. 78, n. 70).

STATUTES INVOLVED

In addition to the statutory provisions set forth in the Appendix to the Union's brief, the following provisions of the National Labor Relations Act (61 Stat. 136, 65 Stat. 601, 29 U. S. C. Secs. 151 *et seq.*) are also involved:

PREVENTION OF UNFAIR LABOR PRACTICES

> Sec. 10 (b) whenever it is charged that any person has engaged in or is engaging in any * * * unfair labor practice, the Board * * * shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing * * * at a place therein fixed, not less than five days after the serving

> of said complaint: * * * Any such complaint may be amended at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed to the complaint.

Also involved is Section 5 (a) of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. Sec. 1004 (a)), as follows:

> Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing * * *
>
> (a) Notice—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. * * *

SUMMARY OF ARGUMENT

The Board properly dismissed the 8 (a) (5) allegations of the complaint in view of the General Counsel's failure to show that the Union made a proper request for bargaining.

A. The Board may find an employer to have refused to bargain in violation of Section 8 (a) (5) of the Act only where the proof sustains the allegations of the complaint as to all the essential elements of the violation, including a request to bargain with respect to the unit alleged to be appropriate, or a substantially similar unit. Statutory provisions and pro-

cedural due process preclude the Board from finding that an employer who successfully refutes charges of a specific violation has engaged in another and different violation not alleged in the complaint and not litigated at the hearing.

The Board properly requires that a union which seeks to bargain must specify the desired unit with reasonable definiteness so that the employer may comprehend which employees are affected and determine his statutory rights and obligations accordingly. This requirement does not place an undue obligation on unions.

In the case at bar the Union asked to bargain only for the Company's driver-salesmen and never departed from that request, although for tactical reasons, once the strike began, it began to organize the other three categories of employees in the Company's Sales Department. The complaint and bill of particulars alleged as the appropriate unit one comprising all four categories, and further alleged a request and refusal to bargain with respect to such four-category unit, a unit which the Board found was "substantially different" from a unit of driver-salesmen alone. The proof showed a request to bargain for the driver-salesmen unit and failed to show either a request or refusal to bargain with respect to the unit to which the complaint referred. Finding this showing inadequate to support the allegations of the complaint in this regard, the Board validly dismissed this part of the case.

B. The Board reasonably concluded that the unit as to which the Union requested bargaining was "substantially different" from the unit alleged in the complaint and found by the Board to be appropriate.

The Board's exercise of its statutory discretion in determining questions involving appropriate units will not be disturbed unless its conclusions are arbitrary. The Board's conclusion here is not vulnerable on this score.

The unit of driver-salesmen, as to which the Union made its bargaining request, was not only a substantially smaller unit than the four-category unit which the complaint alleged to be appropriate, but the driver-salesmen had different responsibilities from the employees in the other three categories, the former having important sales functions which the employees in the other three groups did not have. The Union itself recognized the different interests of these groups by making no effort to organize the full service drivers, cup route drivers, and sales-trainees until after the strike began. In these circumstances it was a permissible exercise of the Board's discretion under Section 9 (b) of the Act to find that the driver-salesmen unit as to which the Union requested bargaining was "substantially different" from the larger unit on the basis of which this case was litigated.

C. The Board properly rejected the Union's contention that because it made a request for bargaining in what is not an "essentially inappropriate" unit, the Board should have found an unlawful refusal to bargain on the part of the Company, regardless of the

allegations of the complaint and the theory upon which the case was litigated.

As noted above, in passing upon charges of refusing to bargain collectively in violation of Section 8 (a) (5) of the Act, the Board is limited by the allegations of the complaint and cannot find an unlawful refusal to bargain in the absence of proof that the Company refused a request for bargaining with respect to the unit alleged in the complaint to be appropriate or a substantially similar unit. Insofar as the Union may be contending that the Board should have found an unlawful refusal with respect to the smaller unit as to which the only bargaining request was made, the Union is in no position to object to the Board's failure so to find in view of the fact that the allegations in the complaint regarding the appropriate unit conformed exactly to the Union's latest position as to the appropriate unit.

ARGUMENT

The Board properly dismissed the 8 (a) (5) allegations of the complaint in view of the General Counsel's failure to show that a proper request for bargaining was made

A. An employer cannot be held to have refused to bargain collectively unless the proof establishes that the union has requested bargaining with respect to the unit alleged to be appropriate or a substantially similar unit

The basic issue in this case is whether an employer may be held to have refused to bargain in violation of Section 8 (a) (5) of the Act upon a record which establishes that the Union never made a request to bargain for the unit alleged in the complaint and found appropriate by the Board. As the Union rec-

ognizes (Br. 12), the essential elements of a refusal to bargain are (1) that the union represent a majority in an appropriate unit, (2) *that it request bargaining for that unit,* and (3) that the employer refuse the request. *N. L. R. B.* v. *Columbian Enameling and Stamping Co.,* 306 U. S. 292, 297–298; *Sam Zall Milling Co.* v. *N. L. R. B.,* 202 F. 2d 499, 501–502 (C. A. 9); *Barlow-Maney Laboratories, Inc.,* 65 NLRB 928, 943. We shall show that in the instant case the Union never requested bargaining with respect to the unit alleged in the complaint and urged by the Union to be appropriate, and that the only bargaining request made concerned a substantially different unit which was not mentioned in the complaint and which was not involved under the theory upon which the case was tried.

Where a complaint alleges a refusal to bargain with respect to a particular unit, and the record establishes only a refusal to bargain over a substantially different unit, the record requires a dismissal of the complaint. This follows not only from the notice and hearing provisions of Section 10 (b) of the National Labor Relations Act and Section 5 (a) of the Administrative Procedure Act, but it is required as a matter of procedural due process, as well. An employer charged with a specific violation, who has successfully refuted such charges at the hearing, cannot validly be found to have engaged in another and different violation not alleged in the complaint and not litigated at the hearing, even should the evidence support such a finding. *N. L. R. B.* v. *Bradley*

Washfountain Co., 192 F. 2d 144, 149 (C. A. 7); *N. L. R. B.* v. *Kanmak Mills, Inc.*, 200 F. 2d 542, 544–545 (C. A. 3); *N. L. R. B.* v. *Reliable Newspaper Delivery, Inc.*, 187 F. 2d 547, 550 (C. A. 3), reversing on other grounds 88 NLRB 659, 666 and note.

Furthermore, it is essential to the successful functioning of the bargaining process as a whole that unions seeking to open up bargaining relations with an employer define the desired unit with a substantial degree of precision. Contrary to the Union's contention, the Board does not require that unions frame their requests with complete exactness. As the Board pointed out in its decision in this case, quoting from its decision in *Barlow-Maney*, 65 NLRB 928, 941–945, "minor variations in the unit" are permissible (J. A. 5). However, the request for bargaining must be sufficiently definite to enable the employer intelligently to comprehend which employees are affected and to decide whether the unit sought is an appropriate one for bargaining purposes. Absent such degree of precision, the employer has no means of determining his rights and obligations under the Act, and more specifically, whether he is obliged to honor the request for bargaining. It is difficult to see how the Board could rule any other way without disregarding the rights of employers and employees under the Act. See *N. L. R. B.* v. *Jackson Press, Inc.*, 201 F. 2d 541, 544–545 (C. A. 7), citing with approval *Bailey Grocery Co.*, 100 NLRB 576, 579.

As the Board noted (J. A. 6), requiring unions to define the unit sought with a sufficient degree of precision does not place any undue burden upon them.

Unions, of course, know the employees for whom they are entitled to speak, and can readily ascertain their employment classifications. With this information a union can decide upon an appropriate grouping. In the typical case, when a union signs up the production employees of a plant, or the production and maintenance employees, both the union and the employer know fairly accurately the group of employees involved. There may be fringe individuals whose status may be in doubt,[2] but the Board has never held that bargaining requests have to be drawn with such precision as to specify the inclusion or exclusion of such fringe individuals or groups. They come within the "minor variations" in the description of units which the Board permits.

In the instant case the Union had no trouble in framing its bargaining request with precision. It made clear to the Company that it was claiming to speak for the Company's driver-salesmen. Later on, after the strike began, the Union, for tactical reasons, changed its mind about the unit and sought to represent, in addition, three other categories of employees; namely, the Company's full service drivers, cup route drivers, and sales-trainees. The Union, however, never altered its original request to the Company for bargaining on behalf of the driver-salesmen alone.

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[2] For example, there may be plant clericals whose status may be genuinely in doubt. Neither the union nor the employer may know whether they should be included with the production employees, with whom they work, or the office clericals, who have related duties.

Nevertheless, notwithstanding the limited nature of the actual bargaining request, the complaint, as particularized at the hearing in accordance with the Union's latest claim concerning the appropriate unit, charged the Company with having refused to bargain with the Union as the representative not only of the Company's driver-salesmen, but of the three additional categories of employees, as well. The proof adduced in support of the allegations of the complaint showed, as above noted, that the request to bargain had been made on behalf of the driver-salesmen alone, and that no request to bargain had been made with respect to the more inclusive unit alleged to be appropriate. As shown below, the Board properly concluded that a unit of driver-salesmen was "substantially different" from the larger unit alleged in the complaint (J. A. 6–7). The proof thus failing to show that the Union had made any demand for bargaining with respect to the unit as to which the Company was charged in the complaint with refusing to bargain, the Board was obliged to dismiss the refusal to bargain allegations of the complaint.

B. The Board reasonably concluded that the unit as to which the Union requested bargaining was "substantially different" from the unit alleged in the complaint and found by the Board to be appropriate

Recognizing that the proof failed to establish a request for bargaining as to the unit alleged to be appropriate, the Union argued before the Board that the two units were essentially the same, that the addition of the three additional categories of employees did not alter the basic character of the unit, and that the change in units in effect constituted but one of the "minor

variations" in the description of units which the Board has always sanctioned. The Board, as we shall show, properly concluded the two units were "substantially different."

In considering this contention it should be borne in mind that section 9 (b) of the Act vests in the Board broad powers with respect to determination of the appropriate unit. As the Supreme Court stated in *Packard Motor Car Co.* v. *N. L. R. B.*, 330 U.S. 485, 491: "The issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, and none should be by decision. It involves of necessity a large measure of informed discretion and the decision of the Board, if not final, is rarely to be disturbed." Or, as this Court has held, the Board's judgments in this area are not to be upset "unless the Board has acted arbitrarily or capriciously." *Mueller Brass Co.* v. *N. L. R. B.*, 180 F. 2d 402, 404 (C. A. D. C.), 96 App. D. C. 153.

As stated above, the Union requested the Company to recognize and bargain with it as the representative of its driver-salesmen, some 44 in number.[3] The complaint alleged and the Board found that the appropriate unit consisted not only of the Company's driver-salesmen, but also the Company's full service-drivers, cup route drivers, and sales-trainees, making 58 employees in all.

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[3] Although the Union's letter requesting recognition stated that the Union represented "39 out of 46" of the Company's driver-salesmen (J. A. 50), only 44 of these positions were filled at the time of the hearing (J. A. 21).

All four categories of employees, working in one department, concededly have a sufficient similarity of interests (as distinguished from the interests, for example, of the drivers in other departments of the Company) to warrant their inclusion in a unit separate from the Company's production and other employees. However, as between the various groups within this unit, the driver-salesmen have different interests and responsibilities from those of the employees in the other three categories. Thus the driver-salesmen call upon the retailers who are the Company's customers, keep them supplied with Coca Cola, and try to develop new business in their territories. They seek further to promote the sale of the Company's products by offering to furnish advertising displays and signs and by soliciting the sale of vending devices. As they are paid by commission, their promotional efforts have a direct effect upon their earnings. (*Supra,* pp. 1–2).

The full service drivers, cup route drivers, and sales trainees, on the other hand, have no personal contact with the Company's customers. Engaged exclusively in keeping Company-owned vending machines filled with Coca Cola, their duties are more or less mechanical and routine. They can do little in the performance of their duties to improve their earnings, aside from taking care that their machines do not become empty. Unlike the driver-salesmen, the cup route drivers and sales trainees are paid solely on an hourly basis, and receive no commissions at all (J. A. 28, n. 12).

The Board, in determining the appropriate unit, has frequently had occasion to note the differing interests of driver-salesmen from those of drivers not having sales functions. In *L. Fatato, Inc.*, 87 NLRB 546, 547, the Board upheld the contention of the union-petitioner in that case that drivers-loaders-salesmen should be excluded from a unit of drivers and helpers, stating that the former were "primarily interested in soliciting." In *Chesty Foods, Inc.*, 98 NLRB 1185, 1186, the Board commented that the driver-salesmen were "essentially salesmen" and therefore should not be included in a unit with over-the-road drivers who had no sales functions at all. To the same effect are *Jax Beer Co.*, 89 NLRB 1233, 1234; *National Brands, Inc.*, 81 NLRB 1163, 1164–1165; *Flint Oil Co.*, 88 NLRB 634, 636; *Rockford Coca Cola Bottling Co.*, 81 NLRB 579, 582.

The Union itself had long recognized the differing interests of the driver-salesmen from those of the other employees. The unit agreed upon in the consent elections of 1944 and 1948 had excluded the other three classifications. The Union sought to organize them only after the strike began and then only for the tactical reason that it wished to prevent these employees from taking over the jobs of the striking driver-salesmen (*supra*, p. 2).

Under all the circumstances, we submit that it was a reasonable exercise of the Board's discretion under Section 9 (b) of the Act to find that the driver-salesmen unit as to which the Union requested bargaining was substantially different from the larger unit

on the basis of which this case was actually litigated. Accordingly, the Board properly dismissed the refusal to bargain allegations of the complaint because the proof showed that the Union had not made a proper request for bargaining in the unit alleged to be appropriate.[4]

C. In view of its insistence upon a larger unit the Union cannot be heard to urge that its original request for a driver-salesmen unit is sufficient to support a finding of an unlawful refusal to bargain

As a corollary to the Union's contention that the two units are substantially the same, the Union urges that it made a proper bargaining request to represent the driver-salesmen and that the Board therefore should have found an unlawful refusal to bargain on the part of the Company. The Union's position, as

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[4] The Board properly rejected the Union's contention (Br. 14–15, 25–26) that this case is governed by *Sunrise Lumber*, 115 NLRB 866, enforced 241 F. 2d 620 (C. A. 2). As the Board pointed out in its opinion, the cases are significantly different. As the Union itself recognizes (Br. 14), *Sunrise* concerned a request to bargain for a unit of drivers and yardmen, alleged by the union to consist of five drivers and one yardman. Actually, the unit included one additional yardman and two additional drivers. Accordingly, the Trial Examiner and the Board, in ascertaining the union's majority status, took into consideration the fact that the stated unit comprised nine employees instead of six as alleged. Since the union, in any event, represented a majority of the employees in the specific unit for which it sought to bargain, the Board found it appropriate to sustain findings of a refusal to bargain upon the employer's refusal of the request. Here, unlike *Sunrise*, the Union sought to add three additional categories of employees to the requested unit in contrast to *Sunrise* where, as the Board observed (J. A. 6, n. 6), "the only change by the Trial Examiner consisted of the addition of certain employees to the categories requested."

stated at p. 25 of its brief, is that as long as "the union makes a demand for bargaining as representative of employees in what is not an essentially inappropriate unit and it is the majority representative of the employees in the unit requested and the unit later found appropriate, the conditions precedent to the employer's obligation to bargain have been met." It is not clear whether the Union means that the Board should have found a refusal to bargain with respect to a unit limited to the driver-salesmen, or whether the Board should have found a refusal as to the larger unit alleged in the complaint. Neither position would be well taken.

With respect to the larger unit, no request to bargain was ever made. As shown in part A above, the Board, in passing upon alleged refusals to bargain in violation of Section 8 (a) (5) of the Act, is limited by the theory of the complaint. Where a complaint alleges and the case is tried on the theory that an employer has refused to bargain with respect to a specified appropriate unit, and the proof shows that the only bargaining request was made with respect to a substantially different unit, there has been a failure of proof with respect to an essential element of the violation and the Board has no alternative but to dismiss the complaint.

As to the smaller unit of driver-salesmen alone, the Union cannot validly complain of the Board's failure to find a refusal to bargain with respect to such a unit. It was at the instance of the Union that the complaint was broadened to include the additional three cate-

gories of employees in the sales department (Union's br. 6). Had the issue of the appropriateness of the smaller unit been raised by the complaint or litigated at the hearing, the Board might have found the smaller unit of driver-salesmen appropriate. However, no such issue was presented. In these circumstances the Union cannot be heard to complain of the Board's failure to find a refusal to bargain with respect to the smaller unit as to which the request to bargain actually was made.

We believe the Union is mistaken in contending that the Board's decision in *Barlow-Maney,* 65 NLRB 928, *Bailey Grocery,* 100 NLRB 576, and *Smith Transfer,* 100 NLRB 834, support its position that as long as the unit requested is not essentially inappropriate a proper bargaining demand has been made. The result here is consistent with *Barlow-Maney* and *Bailey Grocery,* and *Smith Transfer* is inapplicable under the circumstances of this case, as we shall demonstrate.

Barlow-Maney was litigated on the basis of a request for bargaining on a plant-wide unit, although the union was unable to show majority status in that unit. The Board, without reaching the question of the appropriate unit, reversed the Trial Examiner's finding of a refusal to bargain in a smaller unit because the union at the time it requested bargaining did not represent a majority of the employees in the unit requested (65 NLRB, at 941–945). Nothing in the *Barlow-Maney* decision detracts from the validity of the Board's conclusion here. The case holds only

that in deciding whether the proof supports the allegations of the complaint as to a refusal to bargain with respect to a specified unit, the Board must consider the situation and determine the employer's bargaining obligation as of the time of the bargaining request. If, as in *Barlow-Maney,* the proof shows a request in the same or substantially the same unit alleged in the complaint to be appropriate, but fails to establish that the union represented a majority in the unit at the time of the request, then an essential element of the violation is lacking and the complaint must be dismissed.

In the instant case the employer was charged with refusing to bargain as to a unit of driver-salesmen plus three additional categories of employees. The Board here, as in *Barlow-Maney,* in determining whether the Company was obliged to bargain as to the unit alleged in the complaint, considered the situation as of the time of the request for bargaining, and found no evidence of a request for bargaining in the larger unit alleged to be appropriate, but only a request for bargaining as to a smaller and different unit. Hence the Board concluded that there was no proof of a proper request and therefore no violation. Thus the Board's decision here fully accords with that in *Barlow-Maney.*

Similarly, there is no inconsistency between the Board's decision here and that in *Bailey Grocery,* 100 NLRB 576, 577–579. In that case the bargaining request was for a plant-wide unit. In the later unfair labor practice proceeding, however, the employer was charged with refusing to bargain with respect to

a smaller unit of truck drivers. The Board, following its decision in *Barlow-Maney* that the employer's bargaining obligation is to be determined as of the time of the request for bargaining, held that the request for a plant-wide unit was not a proper bargaining demand to support refusal to bargain charges with respect to the smaller unit, and accordingly dismissed the complaint.

Under both *Barlow-Maney* and *Bailey Grocery* the Board, in determining whether Section 8 (a) (5) has been violated, considers the employer's obligation as of the time of the request to bargain, and unless the proof sustains the allegations of the complaint with respect to all of the essential elements of the violation as of this time, no violation can be found. Nothing in either of these cases suggests that the allegations of the complaint may be disregarded if the proof shows a refusal with respect to another and different unit, which the Board, in other circumstances, might find appropriate.

Smith Transfer, 100 NLRB 834, also relied on by the Union, is applicable only where a union makes an ambiguous request for bargaining. In that case the Union's request could have been interpreted either as a request to bargain on behalf of truck drivers alone or on behalf of the drivers and a grease mechanic. The Board held that in such situations, assuming that either unit could be found appropriate, the Union must show that it represents a majority of the employees in either of the two units.

Here, unlike *Smith Transfer,* no ambiguity lurked in the Union's request for bargaining. The Union concededly specified that it was speaking only for the Company's 46[5] driver-salesmen. This very specific number excluded the other employees in the three additional categories which the Union subsequently signed up and later, at the hearing, sought to include in the unit with the driver-salesmen. The rule of the *Smith* case is thus not applicable here. It is one thing to find that an employer is obliged to bargain collectively under the circumstances of the *Smith* case, where the request could reasonably be construed as covering the unit found appropriate, and an entirely different matter to hold that such an obligation exists where, as here, the only request for bargaining was made with respect to a unit substantially different from that charged and found by the Board to be appropriate.

To recapitulate, the Board in passing upon charges of refusing to bargain collectively is limited by the allegations of the complaint and the theory of the case. Where, as here, the proof fails to show that any request for bargaining was made as to the unit alleged to be appropriate, an essential element of the violation is lacking, and the Board must dismiss the complaint. Particularly where, as here, the unit alleged in the complaint to be appropriate conforms exactly to the Union's latest position regarding the unit, the Union cannot validly object that the Board failed to find a refusal to bargain on the part of the Company with respect to another and different unit.

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[5] See footnote 3, p. 11, *supra.*

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should deny the Union's petition to set aside the Board's dismissal of those portions of the complaint alleging that the Company had violated Section 8 (a) (5) of the Act.

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REPLY BRIEF FOR PETITIONER

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the District of Columbia Circuit
FILED
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No. 13,883

BREWERY AND BEVERAGE DRIVERS AND WORKERS LOCAL UNION No. 67, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,883

BREWERY AND BEVERAGE DRIVERS AND WORKERS LOCAL UNION No. 67, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

REPLY BRIEF FOR PETITIONER

The Board, in its Decision, merely considers the Union's demand for bargaining in the abstract apart from the context in which it occurred. It concluded from the isolated facts that, since it determined in 1957 that the appropriate unit of "Drivers and Driver-Salesmen" encompassed 58 employees and the Union in 1953 only included 44 of the 58 employees in its demand for this unit, a proper demand for bargaining was not made. The Board's conclusion of an improper demand is hinged on the confines of the single unit of "Drivers and Driver-Salesmen".

As pointed out in Petitioner's original Brief, the question of whether a proper demand is made in Section 8(a)(5) is determined at the time of the refusal to bargain. Whether the demand was proper or not is not determined solely by the employee composition or confines of a unit. Rather, the essential appropriateness or inappropriateness of the unit demanded and the Union's majority at the time of the demand are the relevant factors. Further, a most important factor bearing on whether a proper demand has been made is any action taken by the employer upon the demand.

The Board, in its Decision, and Counsel for the Board in his Brief completely ignore the question of the essential appropriateness of the unit of employees requested and examine the demand completely apart from the context of employer conduct in which it occurred.

By ignoring these factors, the Board has made the failure of an employer to bargain dependent not on a Company's good faith refusal to bargain, but on a Union's describing by metes and bounds the composition of the unit for which it demands bargaining. By ignoring these factors, the Board gives absolutely no weight to the Trial Examiner's findings of fact of the circumstances surrounding the Union's bargaining demand. The Trial Examiner found that the unit demanded was the same unit of employees in which previous consent elections had been held. That when the Company refused to bargain with the Union, it knew full well exactly the confines of the unit demanded and that the Union represented the overwhelming majority of these employees. The Trial Examiner further found that the Company, at the time it refused to bargain, not once questioned the majority status of the Union or the appropriateness of the confines of the unit demanded. The Company simply refused to bargain until a Board election was held and embarked on a campaign of interference,

restraint and coercion in violation of Section 8(a)(1) with the avowed purpose of destroying the Union's organizational efforts. The Trial Examiner made the crucial finding for an 8(a)(5) violation that the Company's refusal was in bad faith.

The Board, in its Decision, completely ignored the above findings of the Trial Examiner. In effect, the Board refused to consider the whole record in the case. Upon a review of the record considered as a whole under *Universal Camera* v. *National Labor Relations Board,* 340 U.S. 471, 71 S. Ct. 456, and by an according of proper weight to the findings of the Trial Examiner (particularly in a failure to bargain violation of the Act (*National Labor Relations Board* v. *James Thompson Co.*, 208 F(2d) 943)), it is abundantly clear that the Union did make a proper demand for bargaining. To excuse the Company's refusal to bargain in good faith on the grounds that a proper demand was not made when the Union represented a majority of the employees, made a demand for bargaining in an essentially appropriate unit, and the Company never once questioned the appropriateness of the unit, on its face is an arbitrary construction of the statute and undermines the entire collective bargaining process. The inherent errors on which the Board's Decision is based are pointed up by the argument advanced in support of the Decision by counsel for the Board.

I.

The General Counsel, in his Brief, promises to show that the Complaint alleged a demand for bargaining in one unit but, at the hearing, the Union proved a demand in a different unit. Since the unit proved was not mentioned in the Complaint and not involved under any theory of the Complaint, even if the refusal to bargain for that unit violated the Act, the General Counsel argues that the Com-

plaint must be dismissed.[1] The General Counsel, although premising his argument on the existence of two different units, two different theories of the case, and two different violations, never proves their existence (Bd. Brief, pp. 7, 8). Actually, there was only one unit and one violation alleged, proved and litigated.

The Complaint alleged a demand for bargaining in a "drivers and driver-salesmen" unit. At the hearing, the Union proved a demand for bargaining in the same "drivers and driver-salesmen" unit alleged in the Complaint. True, there was a difference in the particular employees that composed the "drivers and driver-salesmen" unit to the extent that the Union, by its demand, included the 44 driver-salesmen in this unit while the Trial Examiner, in determining the appropriate composition of such a unit, included the 44 plus their 14 apprentices or trainees. However, this difference was not a difference in units but merely a difference in the scope and confines of the number of employees in this one unit.

The Board in its Decision, like the General Counsel, speaks in terms of two substantially different units and erroneously points to the Bill of Particulars for support. The Bill of Particulars does not allege a different unit from the unit alleged in the Complaint. The Bill of Particulars (JA-97, 98) merely sets out the "job classifications" in a unit of "all drivers and driver-salesmen". The job classifications were defined as "Driver-Salesmen, full service drivers, cup route drivers and sales trainee drivers" (JA-98). Thus, by the Bill of Particulars, the job content or definitional content of a driver-salesmen bargaining unit was particularized. No new bargaining unit was alleged; the scope and confines of the unit alleged was merely delineated.

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[1] The explanation that follows of the Complaint and the Bill of Particulars in this case and of the issues actually litigated at the unfair labor practice hearing makes it clear that the cases cited by the Board (Bd. Brief, pp. 7, 8) in this regard are not in point.

Thus, the variance of allegations and proof that the General Counsel and the Board speak of actually is a difference of numbers in the single unit of drivers and driver-salesmen. In actuality, the General Counsel is reduced to the position in his Brief that, irregardless of the merits of the case, the Complaint was properly dismissed for the failure to prove an allegation of a demand for the 58 employees in the unit, even though a demand for 44 of the employees in the same unit was proved and the employer's refusal to bargain for those 44 employees constituted a violation of the Act.

This argument is reminiscent of the old rules of common law pleading. Under modern practice, irrespective of any variance between pleading and proof, so long as issues are litigated and a party given notice and full opportunity to defend, a party cannot thereafter claim a lack of due process. As this Court said in *Kuhn* v. *Civil Aeronautics Board*, 183 F(2d) 839, 841, 87 U.S. App. D.C. 130, 132:

> "The whole thrust of modern pleading is toward the fulfillment of the notice giving function and away from the rigid formalizing of the common law (cases cited). It is now generally accepted that there may not be subsequent challenge of issues which are actually litigated if there has been actual notice and adequate opportunity to cure surprise (cases cited). If it is clear that the parties understand exactly what the issues are when the proceedings are had, they thereafter cannot claim surprise or lack of due process because of alleged deficiency in the language of particular pleadings. Actuality of notice there must be, but the actuality, not the technicality, must govern."

Contrary to the assertion of the General Counsel, irrespective of the allegations of the Complaint, the issue of whether the Union's demand for bargaining for the 44 driver-salesmen was or was not a proper demand for bargaining was fully litigated. The nature of the Union's demand and the appropriateness of the unit demanded was

fully litigated. At the hearing, the Union made it clear and never wavered from the position that it had demanded bargaining for the 44 driver-salesmen in the unit of "drivers and driver-salesmen". On the other hand, the Company took the position that the Union's demand was unclear and, even if clear, it was for all the drivers and driver-salesmen in all the Coca Cola plants in the area. The Trial Examiner resolved the issue by concluding the Company knew full well the demand was for the 44 (JA-79). It is clear that every possible facet of the issue of the unit for which the Union demanded bargaining was fully litigated.

Equally fully litigated was the question of whether the unit demanded was an appropriate unit. The General Counsel, at the time of the Bill of Particulars, made clear his position that a "drivers and driver-salesmen" unit composed of 44 or 58 employees was an appropriate unit. The General Counsel stated that such a unit with the 58 employees was more appropriate (JA-59). On the other hand, it was the Company's position that either a plant-wide unit was the only appropriate unit or, if a driver-salesmen unit was appropriate, it should include the over a hundred Coca Cola employees who, at one time or another, drove a truck (JA-59, 60, 67). Thus, the issue of the appropriateness of a drivers and driver-salesmen unit was fully litigated as was the confines of such a unit. Clearly then, irrespective of any variance in the pleadings, the General Counsel's argument of variance is without merit.

The Board, in finding, contrary to the Trial Examiner, a substantial difference between the 58 and the 44, concludes a proper demand was not made. Obviously, the Board is measuring the employees claimed in the unit against the employees later found appropriately within the confines of this unit. Such a comparison is the sole test. Irrespective of majority status or the failure of the employer to question the confines of the unit, if what the Board calls a substantial difference exists between the number of em-

ployees, then a proper demand has not been made. The Board ignores completely the question of whether the employees claimed constituted an essentially appropriate or inappropriate grouping. For the reasons given in the original Brief, as subsequently amplified in this Reply Brief, this method of determining a proper demand for bargaining is not supported by reason or judicial precedent. But, even assuming *arguendo* that the Board comparison theory is sanctioned by the Act, it was improperly applied here for there is no substantial difference between a "drivers and driver-salesmen" unit composed of 44 or of 58 employees.

II.

In its Decision, the Board speaks of a substantial difference in units. As pointed out previously, the difference was not one of units but of the confines of a "drivers and driver-salesmen unit". In overruling the finding of the Trial Examiner that any difference was only minor rather than substantial, the Board, without findings of fact, reasons, or analysis, blandly concludes there was a substantial difference. There is a basic fallacy in this conclusion.

This substantial difference consists of a difference between a group of 44 driver-salesmen and a group of 44 driver-salesmen plus three groups of trainees. The Board states that the groups substantially differ but, at the same time, places the groups of trainees with the group of driver-salesmen within the confines of what it determined to be the appropriate unit. To be placed within a single unit, they had to be substantially similar, not substantially different. This is so because of the basic criteria that the Board follows in determing the confines of an appropriate unit. The Fourteenth Annual Report (1949) of the Board states this criteria as follows (p. 32):

> "Thus, in resolving unit issues, the Board is still guided by the fundamental concept that only employees

> with a substantial mutuality of interest in wages, hours and working conditions as revealed by the type of work they perform should be appropriately grouped in a single unit."

The Trial Examiner followed the basic criteria and grouped the three trainee driver groups with the driver-salesmen because they were training to be driver-salesmen and have mutuality of interest and perform similar work. The Board approved this grouping. If these trainee drivers can be grouped in a single unit with the driver-salesmen, there must be a substantial mutuality of interest to meet the content of the Board's standard for a single unit with driver-salesmen. If the driver trainees are grouped with the driver-salesmen, this is not a "substantially different" unit but is a substantially similar unit—the driver-salesmen unit.

The inconsistency of taking any other position is pointed up in the argument of counsel for the Board on page 12 of the Brief. He argues that the groups have sufficient mutuality of interest to be grouped in a single unit of driver-salesmen separate from other drivers and other employees in the Company's Production and Maintenance Divisions. If this is so, there is a substantiality of interests and work among the groups. Yet, in the same breath, in order to rationalize the Board's substantial variance, he argues:

> "However, as between the various groups within this unit, the driver-salesmen have different interests and responsibilities from those of the employees in the other three categories" (Bd. Brief, p. 12).

If they have different interests, they are not properly within the confines of the same appropriate unit. However, the three trainee driver groups basically have the same interests as the driver-salesmen—they are training to be driver-salesmen. The Board recognized this when it approved the finding of the Trial Examiner that they are appropriately grouped as a single bargaining unit under Section 9(a) of the Act.

Clearly then, the assertion that a substantial difference exists is without merit. The General Counsel attempts to clothe the Board's determination of the existence of a substantial difference in the broad powers vested in the Board under Section 9(b) of the Act. Section 9(b) relates to determinations of what is an appropriate unit.

The Union has no quarrel with the Board's determination of the appropriate unit in this case. The determination of a substantial difference arises not in connection with a Section 9(b) unit determination, but in connection with whether a proper bargaining demand was made within the meaning of Section 8(a)(5). The theory that the findings of fact and conclusions of law in an 8(a)(5) violation of the Act are not reviewable by this Court unless an abuse of discretion is shown is without judicial precedent. On the contrary, in view of the disagreement of the Trial Examiner and the Board on the question of a difference, the Board's conclusion is subject to greater scrutiny by the Courts. *Universal Camera Corp.* v. *National Labor Relations Board, supra.* In any event, whatever this Court's scope of review may be, the Board acted arbitrarily and capriciously in making this determination of a substantial difference. Such a conclusion is without a reasonable foundation in fact, and there is no evidence in the record, substantial or otherwise, to support the Board's determination.

III.

Counsel for the Board speaks in terms of a smaller unit and a larger unit. Counsel argues that no refusal to bargain can be found in either the smaller or the larger unit because, with respect to the smaller, there was no allegation of a demand to bargain in it and, with respect to the larger, there was no proof of a demand to bargain in it.

Counsel for the Board is wrong in his basic premise that there were two units in this case. As mentioned previously, there was only one unit, any difference being in the confines

of this drivers and driver-salesmen unit. The issue of a demand in this one unit and of its appropriateness was fully litigated at the hearing.

Even assuming there were two units as Counsel argues, they were both "drivers and driver-salesmen" units and the units were composed of groups of employees with a substantial mutuality of interest in wages, hours and working conditions, as revealed by the type of work they perform. Thus, the units were substantially similar and overlapping and the demand in the smaller was a demand in a unit substantially similar to the larger unit. Even under Counsel for the Board's theory, if the smaller unit demanded was substantially similar to the larger, the refusal to bargain is not excused. Accordingly, even under Counsel for the Board's theory of the case, the Union made a proper demand for bargaining.

The Board's Brief directs an attack against the position of the Union in its original Brief that, under the Board's Decision in *Barlow-Maney,* 65 NLRB 928; *Bailey Grocery,* 100 NLRB 576; and *Smith Transfer,* 100 NLRB 834, as long as the unit requested is not essentially inappropirate, a proper bargaining demand has been made.[2] Counsel then proceeds to misread the holding of these cases to conclude the result reached by the Board herein is consistent with the above cases. Counsel for the Union stands on its previous analysis of these cases.

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[2] A driver-salesmen bargaining unit is a classic, historic bargaining unit in the soft drink industry. The Board, in *Rockford Coca Cola,* 81 NLRB 582, at 597, stated "a unit of route salesmen of the employer is prima facie an appropriate unit". In numerous other cases, the Board has decided that a driver-salesmen unit is an appropriate unit in the soft drink industry. At the hearing, the position of the General Counsel was that a "drivers and driver-salesmen" unit composed of the 44 route salesmen or of the route salesmen plus their 14 apprentice-trainees was appropriate. It is to be noted that apprentices are always grouped with a craft group or helpers and trainees are grouped with a craft unit. See Fifteenth Annual Report of the Board (1950), p. 42; *Rice Sticks Dry Goods Company,* 85 NLRB 514; *Armstrong Cork,* 89 NLRB No. 47; *Park Shena Company,* 89 NLRB No. 100; *Pacific Outdoor Company,* 90 NLRB No. 25.

In fact, the Board in its Brief admits that these cases stand for the proposition that the Board must measure the refusal to bargain as of the time the request for bargaining is made (Bd. Brief, p. 17). Counsel for the Board states that the Board "considered the situation as of the time for bargaining, and found no evidence of a request for bargaining in the larger unit alleged to be appropriate, but only a request for bargaining as to a smaller and different unit". However, the above statement is misleading. The Board did not measure the refusal as of the time of the demand. The Board made no determination of the essential appropriateness or inappropriateness of the unit demanded in January, 1953. In fact, the Board, in its Decision, avoids answering or considering that very question and merely measured what it refers to as the unit of employees demanded in 1953 against the appropriate unit of employees it established in 1957.

As mentioned previously, the confines, that is the employees in the unit demanded, are measured by the most appropriate confines of this unit the Board finds proper years subsequent to the demand. This approach is not only contrary to the previously cited cases but, on its face, is destructive of the collective bargaining process. By this Decision, the Board is telling unscrupulous employers that, even at the time you wrongfully refuse to bargain in bad faith and you raise no question concerning the appropriateness of the unit demanded, we will give you a clean bill of health if the Union cannot prove that its demand encompassed all the employees the Board at some later date determines to be within the most appropriate confines of the unit.

The net result of this Decision is to consider the demand of the Union in a vacuum. As one reads previous 8(a)(5) cases decided by the Board and the Courts, the request for bargaining is inherently tied in with the question of whether or not there was good faith bargaining on the part of the

employer. The statute which the Board administers was designed to encourage the process of collective bargaining. All that is required "to put an employer in default", as the Supreme Court stated in the *Columbian Enameling and Stamping Company,* 306 U.S. 292, is that "the employees must at least have signified to the employer their desire to negotiate". Even if the employer refused to bargain in good faith although he impliedly understood the request for bargaining, there would be a violation. The statute which the Board administers does not require that the request to bargain be *in haec verba* so long as there is one by clear implication. In this, as in other matters under the statute, no special formula or form of words need be employed. *Joy Silk Mills,* 87 U.S. App. D.C. 459, 185 F(2d) 732, 741 (cert. denied, 341 U.S. 914); *National Labor Relations Board* v. *Vandekamps Holland Dutch Bakeries, Inc.,* 152 F(2d) 818; *Lebanon Steel Foundry Co.* v. *National Labor Relations Board,* 76 U.S. App. D.C. 100, 103, 130 F(2d) 494.

In *Rockaway New Supply Company,* 340 U.S. 71, 97 L. Ed. 832, the Supreme Court of the United States, speaking through Mr. Justice Jackson, covered this question by the following expression:

> "Substantive rights and duties in the field of labor management do not depend on verbal ritual, reminiscent of medieval real property law."

In face of all that has been said on this subject to the contrary, it is ironic that the Board now holds that, in the field of collective bargaining, a request for bargaining must set forth the unit by "metes and bounds" and be particularized to include and exclude all the job classifications that the Board might determine only after an extensive hearing and an analysis of the testimony based on the record of the hearing. The Board's Decision in the instant case demands of a union that it define the bargaining unit as if it were a conveyance at common law which required real property to

be described in "metes and bounds". The Board's reasoning and Decision in the instant case is wholly inconsistent to the actual give and take rules of collective bargaining.

In justification of its Decision, Counsel for the Board (Bd. Brief, p. 8) states that it is essential to the functioning of the bargaining process as a whole that unions seeking to open up bargaining relations with an employer define the desired unit with a substantial decree of precision. The Board further states that the bargaining request must be sufficiently definite to enable the employer intelligently to comprehend which employees are affected in order to decide whether the unit sought is an appropriate one for bargaining purposes. This Board ignores the findings of fact made by the Trial Examiner that there was no doubt in the employer's mind that the Union intended the exact unit the employer and the Union had agreed upon in two previous consent elections. The employer would not have bargained in any unit. It had no interest in comprehending the employees affected. When the reason for a rule ceases, the rule should also cease.

The Board further justifies its result in the availability to the Union of the Board's election procedure if the Union has any doubts as to the confines of a unit. To say the Union can use the election process is to give a cause of action without a remedy for, as pointed out in the Union's original Brief, a Union waives all unfair labor practices by participating in an election.

The Board overlooked the fact that, under Section 9(c)(1)(B) of the Act, the Company could have filed an RM petition to resolve the majority status of the Union or the appropriateness of the unit that the Union demanded. *Whitney Co.*, 81 NLRB 75; *J. P. O'Neil Co.*, 94 NLRB 1299. The statute now provides a complete remedy for an employer who has any bona fide doubts concerning majority status or appropriateness of the unit. As Mr. Justice Frankfurter said in *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 104:

> "If an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief, while continuing to bargain in good faith at least until the Board has given some indication that his claim has merit."

See *Henry Heidi, Inc.*, 107 NLRB No. 258 (claim of loss of majority, no actual evidence); *Cf. Borden Co.*, 108 NLRB No. 116; *Telegraph Publishing Co.*, 102 NLRB 1173.

The statutory scheme for preserving industrial peace provides a full remedy for the Company if it has doubts about the scope of the unit or the majority of the Union. The Company should not engage in self-help and attempt to set up its own appropriate unit. In *Intercity Advertising Co.* v. *National Labor Relations Board*, 89 NLRB 1103, enf. 190 F(2d) 420 (CCA 4th), the Board disposed of an employer's contentions that the employer had doubts about the scope of the unit demanded by the union with this concise pertinent statement:

> "The Respondent also contends that the Union in making its request for bargaining, did not clearly define the unit sought. In our opinion, the notice given by the Union that it had been designated as the bargaining representative of the Respondent's technical employees at WAYS and WOOG, respectively, was sufficient in this respect. In any event, the Respondent did not ask the Union to clarify its position . . ." (89 NLRB 1111).

The Fourth Circuit, in denying the Company's appeal on the question of doubt concerning the union's unit demand, said:

> "It is argued that the refusal to bargain was justified because the Respondent did not know that the bargaining units were proper or that the union had achieved majority status but the propriety of bargaining units was for the Board, and the Union unquestionably had a majority status in each of the units involved. Respondent, moreover, made no attempt to ascertain

> whether or not the union represented a majority of the employees in an appropriate unit, but declined to bargain when request was made by the union and engaged in unfair labor practices in an attempt to get rid of it as a bargaining representative."

The issues in *Intercity Advertising, supra,* are analogous here. The Company never questioned or asked for clarification of the Union's demand. They did not raise this issue because the Union's demand for a unit was clear and the Company knew it and the Trial Examiner so found (JA-78).

The Board ignored the findings of the Trial Examiner on this critical issue, namely that the request or demand of the Company for the Union to obtain an election (JA-6) was made in bad faith (JA-81).

Whether the unit comprises 44 employees or 58, or whether the units were *different* or substantially the same, nevertheless, as the Fourth Circuit said in *Intercity Advertising, supra,* "the union unquestionably had a majority in either unit".

CONCLUSION

It is respectfully submitted, therefore, that the Order of the Board dismissing the Complaint as to the 8(a)(5) violation be set aside and that the findings and order of the Trial Examiner be reinstated as to the refusal to bargain charge, declaring the strike an unfair labor practice strike together with the reinstatement of the drivers, with back pay.

Respectfully submitted,

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